Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JEAN TRIGALET AND MYRA TRIGALET, as personal representatives of the estates of CONSTANCE TRIGALET AND MARTHA ANNETTE TRIGALET, and LEONARD MUNSON, as personal representative of the estate of STEVEN LEWIS MUNSON,
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether A Municipality Can Be Directly Liable For Violating A Citizen's Substantive Due Process Rights When the Individual Officer's Conduct Did Not Rise to the Level of a Substantive Due Process Violation.

II. Whether A Municipality May Be Directly Liable for Violating a Citizen's Constitutional Rights When the Policies, Practices and Customs of the Municipality Were Arbitrary, Conscience Shocking and a Proximate Cause of the Deaths of the Petitioners' Decedents.

PARTIES TO THE PROCEEDING

Petitioners

Jean Trigalet and Myra Trigalet are the parents and personal representatives of the estates of Constance Trigalet and Martha Annette Trigalet. Leonard Munson is the father and personal representative of the estate of Steven Lewis Munson. These parties will be collectively referred to as Petitioners. Petitioners were plaintiffs in the original action and appellees before the Tenth Circuit Court of Appeals on interlocutory appeal.

Respondent

City of Tulsa, Oklahoma is a municipal corporation in the state of Oklahoma. Respondent Tulsa was a defendant in the district court proceedings and an appellant before the Tenth Circuit Court of Appeals on interlocutory appeal.

Other Parties

The Petitioners sued various individual defendants in the original Complaint who were dismissed or who were granted qualified immunity by the Tenth Circuit. These dismissed defendants were not parties to the interlocutory appeal which forms the basis of this petition and have no interest in the outcome of this petition.

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PETITION FOR CERTIORARI

Jean Trigalet and Myra Trigalet, as personal representatives of the estate of Constance Trigalet and as personal representatives of the estate of Martha Annette Trigalet, respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case. In addition, Leonard Munson, personal representative of the estate of Steven Lewis Munson respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

This is the second appeal in this case. The first appeal involved the question of the qualified immunity of the officers involved in the pursuit. In the first appeal, the Tenth Circuit held that the pursuing officers were entitled to qualified immunity. *Trigalet v. Young*, 54 F.3d 645, 648 (10th Cir. 1995), *cert. denied*, 516 U.S. 932 (1995). This ruling is not an issue in the instant appeal.

The second appeal was an interlocutory appeal which dealt solely with the issue of municipal liability. On August 27, 1997, the District Court entered an Order denying Tulsa's motion for summary judgment on Petitioners' direct and indirect municipal liability claims. (App. D at 41a-56a). However, the District Court stayed further proceedings pending this Court's determination of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 520 U.S. 1250 (1997). After this Court ruled in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), Tulsa renewed its motion for summary judgment. On August 17, 1998, the Trial Court entered an Order granting in part and denying in part Tulsa's motion for summary judgment. (App. C at 23a-40a). On

October 27, 1998, the District Court entered an Order certifying a controlling question of law to the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). (App. B at 16a-22a). On November 29, 1998, Tulsa filed a petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) which was granted by the Tenth Circuit on December 4, 1998.

On February 7, 2001, the Tenth Circuit ruled on the interlocutory appeal, holding that Tulsa could not be directly liable for violating the constitutional rights of Petitioners' decedents absent a finding that the pursuing officers violated the substantive due process rights of the Petitioners' children. (App. A at 1a-15a). The Tenth Circuit's Opinion is reported at 239 F.3d 1150 (10th Cir. 2001).

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Tenth Circuit Court of Appeals and its judgment of February 7, 2001. Petitioners invoke the *certiorari* jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

Petitioners filed three separate Complaints against Tulsa and other individuals on May 4, 1992, alleging that the substantive due process rights of their children were violated during the course of an improper high-speed police pursuit. Petitioners' cases were consolidated in the U.S. District Court for the Northern District of Oklahoma on July 1, 1992. On September 17, 1992, the defendants filed a motion to dismiss which was granted by the District Court on March 30, 1993. Petitioners filed a motion to reconsider on April 21, 1993. On November 23, 1993, the District Court granted the motion to reconsider in part and allowed the lawsuit to continue against the officers involved in the pursuit. The District Court left intact the dismissal of the lawsuit against the remainder of the individual defendants and Tulsa.

On January 3, 1994, the officers appealed the District Court's denial of qualified immunity. On May 2, 1995, the Tenth Circuit reversed, holding that the individual officers were entitled to qualified immunity. *Trigalet v. Young*, 54 F.3d 645, 648 (10th Cir. 1995), *cert. denied*, 516 U.S. 932 (1995). On remand, Petitioners filed a motion requesting that the District Court revise its previous order dismissing the case against Tulsa. On January 31, 1996, the District Court granted Petitioners' request and reinstated the lawsuit against Tulsa.

On February 2, 1997, the City of Tulsa filed a motion for summary judgment. On August 26, 1997, the District Court denied Tulsa's motion for summary judgment on Petitioners' direct and indirect municipal liability claims. (App. D at 56a). After denying Tulsa's motion for summary judgment, the District Court stayed further proceedings pending a ruling by this Court in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 520 U.S. 1250 (1997). On May 26, 1998, the Supreme Court ruled in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

On July 2, 1998, Tulsa renewed its motion for summary judgment. On August 17, 1998, the District Court entered an Order granting in part and denying in part Tulsa's motion for summary judgment. (App. C at 38a-40a). Based upon the Supreme Court's ruling in *Lewis* and the Tenth Circuit's decision in *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998), the District Court found that the officers' conduct during the course of the pursuit did not rise to the level of a substantive due process violation because the officers did not have an "intent to injure" Petitioners' decedents. Accordingly, the District Court granted Tulsa's motion for summary judgment on Petitioners' indirect municipal liability claims. However, based upon the rationale of *Williams v. City*

of Denver, 99 F.3d 1009 (10th Cir. 1996), *vacated*, 140 F.3d 855 (10th Cir. 1997) (en banc), the District Court found that Tulsa could be directly liable for violating Petitioners' decedents' constitutional rights based on Tulsa's policies, practices and customs regarding pursuit operations. While the District Court noted that *Williams* had been vacated, the District Court found that the distinction between direct and indirect municipal liability was still valid and persuasive. The District Court found that there were genuine issues of material fact concerning whether Tulsa's policies, practices and customs were arbitrary, conscience shocking and a proximate cause of the deaths of the Petitioners' decedents. Therefore, the District Court denied Tulsa's motion for summary judgment with respect to Petitioners' direct municipal liability claims.

On October 27, 1998, the District Court entered an Order certifying a controlling question of law to the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). On November 29, 1998, Tulsa filed a petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which was granted by the Tenth Circuit on December 4, 1998.[1]

On February 7, 2001, the Tenth Circuit ruled on the interlocutory appeal. Despite the fact that Tulsa's policies, practices and customs were presumed arbitrary, conscience shocking and a proximate cause of the death of the Petitioners' children on interlocutory appeal, the Tenth Circuit held that Tulsa could not be held liable absent a constitutional violation

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[1]For the purpose of the Interlocutory Appeal, Tulsa's policies, practices and customs were presumed to be arbitrary, conscience shocking and a proximate cause of the deaths of Petitioners' decedents.

by the individual officers. It is from this ruling that the Petitioners seek review from this Court in this Petition for Writ of Certiorari.

B. Statement of Facts

On interlocutory appeal, the sole legal issue for determination was whether Tulsa could be directly liable for violating the constitutional rights of Petitioners' decedents. For the purpose of the interlocutory appeal, the following District Court's findings were presumed true: 1) the pursuing officers did not violate the substantive due process rights of Petitioners' decedents because they did not "intend to injure" Petitioners' children during the course of the pursuit; and 2) Tulsa's policies, practices and customs regarding pursuit operations were arbitrary, conscience shocking and a proximate cause of the death of the Petitioners' decedents. As the interlocutory appeal dealt solely with the legal issue of direct municipal liability based on the aforementioned findings of the District Court, an in depth recitation of the facts is unnecessary. The facts of this action are succinctly set forth by the District Court in its Orders dated August 27, 1997, (App. D at 41a-56a) and August 17, 1998. (App. C at 23a-40a).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Resolve A Conflict In The Circuit Courts Of Appeals Regarding Whether A Municipality Can Be Directly Liable For Violating A Citizen's Substantive Due Process Rights When the Individual Officer's Conduct Did Not Rise to the Level of a Substantive Due Process Violation.

A. Pursuant to Monell *and* Canton, *Tulsa Can Be Directly Liable for Violating the Substantive Due Process Rights of the Petitioners' Decedents.*

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court established that local governmental entities are "persons" that can be held liable under § 1983 for violating a citizen's constitutional rights. *See id.* at 690. After extensive analysis of the legislative history of the Civil Rights Act, this Court held that

> Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-691.

To establish municipal liability under § 1983, a plaintiff must show 1) the existence of a municipal policy or custom, and 2) that there is a causal link between the policy or custom and an alleged constitutional deprivation. *See City of*

Canton v. Harris, 489 U.S. 378, 385 (1989). In a "failure to train" case against a municipality, a plaintiff bears the burden of proving that the municipality was deliberately indifferent to the risk of injury stemming from its failure to train. *Id.* at 390. As this Court stated in *City of Canton v. Harris*:

> We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. **In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury**.

Id. at 388-390. (Emphasis added) (Footnote 10 omitted).

Pursuant to *Canton*, when a municipality is deliberately indifferent to the risk of death or serious injury caused by its failure to train its officers, the municipality may be liable for any death or injury sustained at the hands of the municipality's untrained officers. *See id.* at 388. *Canton* suggests that municipal liability can be premised on the deliberate indifference of municipal policymakers, regardless of a police officer's state of mind at the time of the alleged constitutional violation. *See id.* at 389-90. A later case, *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), has been erroneously interpreted by some lower courts, including the Tenth Circuit, to cast doubt on this basic premise.

1. City of Los Angeles v. Heller *Does Not Preclude A Finding of Municipal Liability In A Substantive Due Process Case*

In *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), the plaintiff was injured during an arrest and filed an action under § 1983, alleging that he had been arrested without probable cause and with excessive force. After the individual officers were exonerated by the jury, the district court dismissed the municipal defendants. The Supreme Court upheld the dismissal, noting that the municipal defendants "were sued only because they were thought legally responsible for [the police officers'] actions." *Id.* at 799. The Court concluded that if the police officers inflicted no constitutional injury on the plaintiff, the municipal defendants could not possibly be held liable for the plaintiff's damages. *See id.* In *Heller*, the exoneration of the individual defendants meant that the plaintiff's constitutional rights were not violated, and accordingly, the dismissal of the municipal defendants was obligatory.

Lower courts are divided on the impact of *Heller* on municipal liability claims. The Tenth Circuit has stated that "[a] claim of inadequate training, supervision, and [pursuit] policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised." *Webber v. Mefford*, 43 F.3d 1340 (10th Cir. 1994). Other courts agree. *See, e.g., Wing v. Britton*, 748 F.2d 494, 498 (8th Cir. 1984); *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 20 (N.D. Ill. 1984), *aff'd*, 771 F.2d 194 (7th Cir. 1985); *Sanchez v. City of Riverside*, 596 F. Supp. 193, 195 (C.D. Cal. 1984).

However, many courts have determined that *Heller* does not preclude consideration of municipal liability even

when the individual officers have been exonerated. *See Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (finding sufficient evidence that the city's policies in operating jail caused a constitutional violation, despite absence of any individual liability); *Anderson v. City of Atlanta*, 778 F.2d 678, 685 (11th Cir. 1985) ("*Monell* . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government"); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985) ("*Monell* does not require that a jury find an individual defendant liable before it can find a local governmental body liable. . . ."); *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2nd Cir. 1985) *cert. denied*, 480 U.S. 916 (1987); *Trezevant v. City of Tampa*, 741 F.2d 336, 340 (11th Cir. 1984); *Smith v. City of Oklahoma City*, 696 F.2d 784, 786 (10th Cir. 1983); *Wellington v. Daniels*, 717 F.2d 932, 935-36 (4th Cir. 1983) (stating that claims against municipality and individual are not necessarily dependent upon each other). This conflict reveals that lower courts need further guidance from this Court on the impact of *Heller* on municipal liability claims.

In this appeal, the Tenth Circuit held that a municipality cannot be held directly liable unless the conduct of the officers' rose to the level of substantive due process violation. *Trigalet*, 239 F.3d 1150, 1155 (10th Cir. 2001) (citing *Heller*, 475 U.S. 796, 799 (1986)). This reasoning "renders *Canton* an empty shell, and undermines § 1983 by insulating municipalities from liability precisely when they are most at fault -- when their policies and customs most directly cause their agents to violate constitutional rights." Kritchevsky, Barbara. *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417, 422 (Jan. 1992) [hereinafter "Kritchevsky"].

The Tenth Circuit's reliance on *Heller* to support its opinion is erroneous. First, *Heller* is a Fourth Amendment case and has no applicability to the instant action. In Fourth Amendment cases, liability depends upon an *objective* determination that the challenged search or seizure was constitutionally unreasonable. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). If the officer's actions were **objectively** reasonable, no constitutional injury is committed by the individual officer or by the municipality. Conversely, individual liability under the Due Process Clause depends upon the municipal actor's subjective state of mind. *See Daniels v. Williams*, 474 U.S. 327, 334 (1986); *Medina v. City of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992). As noted by Professor Kritchevsky:

> [w]hen a constitutional violation turns on a **subjective** element, it is wrong to assume that the plaintiff cannot establish a constitutional violation whenever the municipal agent who takes the challenged action is not individually liable . . . . Municipal liability should be imposed if the *Canton* standards are met, that is, if a municipal policy or custom caused the injury and that policy evidenced deliberate indifference to constitutional rights. This analysis is consistent with *Heller*. *Heller* states that the agent who acts must inflict "constitutional harm." That properly means only that the governmental actor must have inflicted the actual harm against which the Constitution protects, not that the agent must also have possessed the subjective mental culpability needed to establish the violation at issue.

Kritchevsky, at 458 (emphasis added).

In short, finding that the individual officers in this case did not possess the requisite mental state does not absolve

Tulsa for its own conduct in violating Petitioners' decedents' substantive due process rights. The Tenth Circuit's ruling in this case and other opinions that similarly interpret *Heller* erroneously hold that municipalities cannot independently violate a citizen's constitutional rights. This faulty analysis renders *Monell* meaningless. If municipalities are "persons" capable of violating a citizen's constitutional rights, the fact that an individual officer lacks the subjective state of mind to support a substantive due process violation is irrelevant to a claim of direct municipal liability. A direct municipal liability claim analyzes whether the policies, practices and customs of a municipality independently violate a citizen's constitutional rights. *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). Further, interpreting *Heller* to require the dismissal of direct municipal liability claims when an individual officer is exonerated is in essence applying respondeat superior to municipal liability claim which was expressly rejected by this Court in *Monell*. *See Monell*, at 691. The conflict between and among the Circuit Courts regarding direct municipal liability requires that this Court grant certiorari in this case and resolve this important constitutional issue.

2. *The City of Tulsa is Directly Liable for its Failure to Train, Supervise and Discipline Its Officers With Respect to Pursuit Applications.*

Municipalities cannot be held liable under § 1983 on a *respondeat superior* theory. *See Monell*, at 691. Petitioners' claim involves direct municipal liability for the results of Tulsa's official policies, practices and customs. *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (finding the county prosecutor gave order that directly resulted in constitutional violation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (finding the decision of city council to

cancel license permitting concert directly violated constitutional rights); *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) (finding that city officials were responsible for the conditions which permitted the murder of the plaintiff to occur, although the individual officers were dismissed); *Trezevant v. City of Tampa*, 741 F.2d 336, 340-41 (11th Cir. 1984) (finding the city liable under § 1983 for improper incarceration, when individual police officers were absolved of all liability); *Garris v. Rowland*, 678 F.2d 1264, 1273-1275 (5th Cir. 1982) (finding the police department liable for the plaintiff's incarceration under an invalid warrant, although the individual police officers were not guilty of a constitutional offense).

Municipal liability has been imposed even though the policymakers did not personally participate in or authorize the harmful conduct. *See Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990) ("Although neither the City nor any of its employees or agents actually killed [the plaintiff], based on the evidence presented in this trial, "a jury reasonably could conclude that the city's conduct was the moving force in bringing about the constitutional violation."); *Chalmers v. Los Angeles*, 762 F.2d 753, 758-59 (9th Cir. 1985) (City Council's conflicting and vague ordinances led to police intimidation and constitutional violation even though police were never accused of wrongdoing); *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976). In fact, municipalities have been held liable under § 1983 **in spite of** the good faith of their agents. *See Owen v. City of Independence*, 445 U.S. 622, 625 (1980); *Garris v. Rowland*, 678 F.2d 1264, 1273-75 (5th Cir. 1982). In a suit involving direct municipal liability under § 1983, the primary issue is whether the municipality caused an injury through the execution of its policies, practices or customs. The state of mind of the individual agent is irrelevant and should not be considered in this claim.

The only state of mind at issue is that of the municipal policymakers who have the power to control the individual agents through policies, practices and customs. As stated by this Court in *Pembaur v. City of Cincinnati*:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" -- that is, acts which the municipality has officially sanctioned or ordered.

475 U.S. 469, 479-80. (Footnote omitted).

It is undisputed that a citizen's right to life is of constitutional dimension.[2] Petitioners submit that when the execution of a municipality's policies, practices and customs causes a victim's death, the municipality is directly liable for violating the victim's substantive due process right to life if the municipality was deliberately indifferent to the risk of death to the victim. In these circumstances, the cause of the constitutional violation is not the action of the individual officers, but the combined deliberately indifferent actions of the municipal policymakers. Accordingly, a municipality can be directly liable for violating a victim's constitutional rights

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[2]*Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (fundamental interest in own life need not be elaborated on); *Cannon v. Taylor*, 782 F.2d 947, 949 (11th Cir. 1986) (right to life is of constitutional dimension); *Easterling v. City of Glennville*, 694 F. Supp. 911, 920 (S.D. GA 1986) (interest in life is of constitutional dimension).

even though no employee could be held individually liable for the violation.

The Third Circuit directly addressed this argument in *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3rd Cir. 1994) (hereinafter referred to as *Fagan I*).[3] In *Fagan I*, three innocent third parties were killed by a fleeing suspect during the course of a high-speed pursuit. The district court found that the individual officers did not violate the plaintiffs' constitutional rights, and dismissed the municipality. *See id.* at 1291. The Third Circuit reversed. In *Fagan I*, the Third Circuit thoroughly discussed the distinctions between individual and municipal liability, stating:

> We hold that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution. Unlike in *Heller*, the plaintiffs in this case brought separate, independent constitutional claims against the pursuing officers and the City. These claims are based on different theories and require proof of different actions and mental states. The pursuing officers are liable under section 1983 if their conduct "shocks the conscience." *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir.1994) (en banc). **The City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and**

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[3] There are two *Fagan* decisions. *Fagan I*, 22 F.3d 1283 (3rd Cir. 1994) and *Fagan II*, 22 F.3d 1296 (3rd Cir. 1994) (en banc). *Fagan II* was an en banc opinion in which the Court solely considered the applicability of the "shocks the conscience" standard to an officer's individual liability.

> **thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty. A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer.** Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct "shocks the conscience." *Id.* The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. **If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City.**

Id. at 1292. (emphasis added).

According to *Fagan I*, a municipality can be held directly liable for violating a victim's constitutional rights during the course of pursuits if the municipality is "deliberately indifferent" to the rights of innocent third parties even though the individual officer's conduct during the course of the pursuit did not rise to the level of a substantive due process violation. *See id.* This opinion is in direct conflict with the Tenth Circuit's decision in *Trigalet*, 239 F.3d 1150.

The same result was reached by the Ninth Circuit in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994). In *Chew*, the Ninth Circuit held that "a city cannot escape liability for the consequences of established and ongoing departmental policy

regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers." 27 F.3d at 1444. The Ninth Circuit further held that a "jury could conceivably decide, for example, that although the officer's on-the-scene decision to use canine force was reasonable under the circumstances, the city was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender." *Id.* at 1445.

Similarly, in *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992), the Eighth Circuit upheld a verdict against a municipality even though no individual officer was found liable, holding that "[a] public entity or supervisory official may be liable under Section 1983 even though no government individuals were personally liable." *Id.* at 207 (citing *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985)); *see also Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172, 1177 (8th Cir. 1986) (upholding verdict exonerating individual defendants but finding municipality liable), *rev'd on other grounds*, 485 U.S. 112 (1988).

Further, the Second Circuit held that individual liability is not a prerequisite for a finding of municipal liability in *Barrett v. Orange County Human Rights Commission*, 194 F.3d 341(2nd Cir. 1999). As the Second Circuit held in *Barrett*:

> Barrett argues that under the Supreme Court's decision in *Monell* a municipality may be found liable for constitutional violations under 42 U.S.C. § 1983 even if no named individual defendants are found to be liable. He asserts that it was therefore error for the district court to remove the question of municipal

> liability from the jury once the jury determined that Lee and Colonna were not liable. We agree. Other circuits have recognized that a municipality may be found liable under § 1983 even in the absence of individual liability. *See Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985)* ("Monell . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government"); *Garcia v. Salt Lake County, 768 F.2d 303, 310 (10th Cir. 1985)*("Monell does not require that a jury find an individual defendant liable before it can find a local governmental body liable."). These courts conclude that even in situations where the acts or omissions of individual employees do not violate an individual's constitutional rights, "the combined acts or omissions of several employees acting under a governmental policy or custom may violate" those rights. *Id.* Thus in *Garcia,* for example, the Tenth Circuit rejected the argument that a jury's finding that ten county employees were not liable for a plaintiff's death was irreconcilable with its finding that the county itself was liable.

Id. at 350.

Numerous other appellate cases are in accord. *See Rivas v. Freeman*, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (holding the policy maker of the County liable for failing to implement proper identification procedures despite the fact that the arresting officers' conduct did not amount to a constitutional violation); *Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990) (refused to enter summary judgment in favor of municipality despite the fact no individual officer committed a constitutional violation); *Morgan v. District of Columbia*, 824 F.2d 1049, 1055, 1063 (D.C. Cir. 1987) (upholding a finding of municipal liability

even though all individual defendants were dismissed prior to trial, since the municipality's customs and policies in operating jail violated plaintiff's constitutional rights); *Hewitt v. City of Stanton,* 798 F.2d 1230, 1233 (9th Cir. 1986) ("The City could . . . be liable under *Monell* . . . even if [the individual officer] was exonerated, as long as [the officer] had, in fact, acted pursuant to municipal policy or regulation."); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) ("Monell . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government").

This Court recognized that constitutional injuries do not necessarily flow from the conduct of any one individual and acknowledged the existence of "'systemic' [constitutional] injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Owen v. City of Independence*, 445 U.S. 622, 652 (1980). By ruling that Tulsa could not be independently liable for violating Petitioners' decedents' civil rights, the Tenth Circuit failed to adhere to the basic principle of *Monell i.e.* that a municipality should be liable when it is "at fault" or the "moving force" behind a constitutional violation. *See Monell*, 436 U.S. at 694; *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 477 (1986) (citing *Monell*); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (*Monell* provided a "fault-based analysis for imposing municipal liability"). Pursuant to *Canton*, a municipality may be liable for violating the constitutional rights of a victim if the municipality is deliberately indifferent to the risk of injury caused by its failure to train its officers. *See Canton, supra*, at 389. This result is consistent with the remedial and deterrent purposes of 42 U.S.C. § 1983, which requires that a party be "at fault" before violating a person's constitutional rights.

For example, if a municipality knows that its officers are performing inherently dangerous activities that pose a risk of death or serious bodily injury, a municipality is under a constitutional duty to provide its officers with proper training to limit the risk of death or serious bodily injury to the public. An individual officer's subjective intent should not preclude consideration of whether the municipality's own policies, practices and customs in failing to properly train, supervise and discipline its officers was an independent cause of a citizen's injuries. In other words, while municipal employees might not have had a subjective "intent to injure," they still may have inflicted constitutional injury by acting in accordance with municipal policies, practices and customs maintained in deliberate indifference to every citizen's substantive due process right to life and personal security.

Under the Tenth Circuit's analysis in *Trigalet*, if an officer did not have the requisite "intent to injure," the court is prohibited from considering the causal role of a municipality's policies, practices and customs in bringing about the harm. This analysis releases municipalities from liability when they are most at fault. The Third Circuit recognized this problem in *Fagan I*:

> It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability [because he lacked the requisite culpability]. It does not follow, however, that the city should also escape liability. The city caused the officer to deprive the plaintiff of his liberty;

> the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Fagan v. City of Vineland, 22 F.3d at 1292.

Accordingly, the Tenth Circuit erred in holding that Petitioners had to prove that the individual officers violated Petitioners' decedents' constitutional rights as a prerequisite to municipal liability. Given the sharp division between the Circuit Courts regarding this issue, particularly the contrary opinions of the Tenth and Third Circuits, Petitioners respectfully request that this Court grant their petition for writ of certiorari to resolve the conflict among the Circuits on this important question of federal constitutional law.

While there is a sharp division among the Circuits on municipal liability, this Court has also expressed its concern over the status of the law of municipal liability. The Circuits disagree as to when a municipality may be held liable for constitutional violations when the individual agent of the municipality is exonerated. This Court has noted the confusion in the law in *Board of Bryan County v. Brown*, 117 S.Ct. 1382 (1997). In *Brown*, this Court noted that a municipality may be directly liable for violating a citizen's constitutional rights, holding that when "a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . Accordingly, proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." *Id.* at 1389.

However, in discussing the current status of the law of municipal liability in *Brown*, justices from this Court noted the conflicting standards and confusing analyses in the Circuits.

Justice Breyer noted that *Monell* "has produced a highly complex body of interpretive law. Today's decision exemplifies the law's complexity as it distinguishes among a municipal action that 'itself violates federal law,' and one that 'has caused an employee to do so.'" *Brown*, at 1401. (Breyer, J., dissenting, joined by Stevens and Ginsburg). As a result, Justice Breyer concluded that reexamination of *Monell* is warranted "as the original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply." *Id.* Further, Justice Souter's dissent, which was joined by Justices Breyer and Stevens, noted that the current status of the law is "hardly settled." *Id.* at 1400.

Petitioners request that this Court use the opportunity afforded by this petition for writ of certiorari to resolve the conflict regarding the analysis of municipal liability claims. Petitioners request that this Court grant certiorari in this case to address the requirements for municipal liability under 42 U.S.C. § 1983 and to create a more workable solution to municipal liability claims.

II. Certiorari Should Be Granted To Resolve An Important Question of Federal Constitutional Law With Respect To Whether A Municipality May Be Directly Liable for Violating a Citizen's Constitutional Rights When the Policies, Practices and Customs of the Municipality Were Arbitrary, Conscience Shocking and a Proximate Cause of the Deaths of the Petitioners' Decedents.

Petitioners submit that municipal liability under 42 U.S.C. § 1983 can be established based on the municipality's conscience shocking behavior even though the conduct of the individual officers did not rise to the level of a substantive due process violation. In this scenario, the constitutional violation

is not committed by the individual officer but by the municipality itself. If a municipality could not be liable unless there was a finding that an individual officer violated the constitutional rights of a citizen, the perverse effect would be that a municipality would escape liability in precisely the circumstances where the municipality is most at fault. Such a result is inconsistent with the remedial and deterrent policies of 42 U.S.C. § 1983.

It is clear that *Monell* established that a municipality, like any other state actor, could be directly liable for a constitutional violation if its conduct amounted to a deprivation of a constitutional right. *See Monell* at 690-691. The Tenth Circuit's opinion completely disregards this basic tenet of statutory construction that municipalities are "persons" within the ambit of 42 U.S.C. § 1983 and, therefore, capable of independently violating a citizen's constitutional rights. *See id.* Accordingly, if the conduct of a municipality who is a "person" pursuant to 42 U.S.C. § 1983 shocks the conscience, the municipality itself is directly liable for a substantive due process violation. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ("Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, ...").

A. The City is Directly Liable Pursuant to Collins *and* Lewis *For Independently Violating the Substantive Due Process Rights of the Petitioners' Decedents.*

This Court thoroughly discussed the requirements for proving a substantive due process violation in two recent cases, *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). While *Collins* involved a direct claim against the municipality, *Lewis* was an individual liability case which set forth the

factors to be considered in determining whether a substantive due process violation occurred at all. These cases set forth the requirements for proving a substantive due process violation. Petitioners submit that if they can prove that the municipality's conduct meets this standard, the municipality can be directly liable for a substantive due process violation regardless of whether the individual officers' conduct rose to the level of a substantive due process violation. Any other result would exonerate the municipality when it is most at fault.

In *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), the plaintiff sued a municipality, claiming that the city violated her husband's substantive due process rights by failing to provide her husband, an employee of the municipality, with proper training and by failing to provide proper safety equipment and warnings. *See id.* at 117-18. The District Court dismissed the action, stating that no constitutional violation had been alleged. On appeal, the Fifth Circuit affirmed the dismissal on a different basis, holding that the plaintiff must prove an abuse of governmental power separate and apart from the proof of a constitutional violation. *See Collins*, 916 F.2d 284, 287-88 (5th Cir. 1990). While affirming the dismissal, this Honorable Court rejected the Fifth Circuit's interpretation as "requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation" as § 1983 "does not draw any distinction between abusive and nonabusive federal violations." *Collins*, 503 U.S. at 119. This Court noted that the "Due Process Clause of the Fourteenth Amendment, and other provisions of the Federal Constitution, afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections." *Id.* at 120.

In *Collins*, this Court noted that in analyzing municipal liability claims, two separate issues must be addressed: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city [was] responsible for that violation." *Collins*, at 120. Because the doctrine of respondeat superior is inapplicable to prove municipal liability, this Court stated that a municipality "is only liable when it can be fairly said that the city itself is the wrongdoer." *Id.* at 122. This Court then reiterated that, under *Monell*, the municipality may be held liable under § 1983 when the "execution of the government's policy or custom . . . inflicts the injury." *Id.* at 123 (quoting *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting)).

Against this backdrop, this Court turned to the question of whether the plaintiff had alleged a violation of a constitutional right. In analyzing the plaintiff's claims, this Court noted that she advanced two theories: (1) that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or (2) that the city's "deliberate indifference" to Collins' safety was arbitrary government action that "shocked the conscience." *See id.* at 126. This Court rejected the plaintiff's first theory as unprecedented noting that the substantive due process clause does not guarantee minimum levels of safety or security in the workplace. *Id.* Turning to the plaintiff's second theory, this Court noted that the city's failure to train its employees could not be characterized as "arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 128. In affirming the dismissal of the plaintiff's claim, this Court summarized its holding as follows:

> In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of

> safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense.

Id. at 130.

Based on this Court's analysis of plaintiff's claims in *Collins*, if the city's conduct could have been characterized as arbitrary in a constitutional sense or conscience shocking, the plaintiff would have stated a claim of direct municipal liability. However, as this Court could not conclude that the city's conduct met this standard, it affirmed the dismissal of the action. However, the sole issue on interlocutory appeal was whether a municipality can be directly liable for a constitutional violation when its policies, practices and customs were arbitrary and conscience shocking, even though no individual officer's conduct rose to the level of a constitutional violation. *Trigalet*, 239 F.3d 1150 (10th Cir. 2001). Based on *Collins*, the answer to this question is clearly, **yes.** *Collins*, at 122 ("[The city] is only liable when it can be fairly said that the city itself is the wrongdoer."). Therefore, the Tenth Circuit clearly erred and failed to follow this Honorable Court's precedent as set forth in *Collins*.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court discussed the requirements for stating a substantive due process claim against an individual officer during the course of a high-speed pursuit. In analyzing substantive due process claims, this Court noted that the "core concept" of substantive due process claims is "protection from arbitrary action." *Id.* at 845. To establish a substantive due process violation, this Court noted that a plaintiff must demonstrate that the conduct in question "shocked the conscience." *Id.* at 846-47. While *Lewis* did not address municipal liability, *Lewis* is a substantive due process case.

As Petitioners are claiming that Tulsa directly violated their children's substantive due process rights, *Lewis* requires that the governmental conduct in question "shock the conscience" to be actionable. In this case, the District Court found that the policies, practices and customs of Tulsa were arbitrary, conscience shocking and a proximate cause of the deaths of Petitioners' decedents. (App. B at 20a-21a; App. C, at 38a-39a; App. D at 54a-56a). Based on *Lewis*, this is sufficient to state a claim for a substantive due process violation. The sole issue on interlocutory appeal was whether a municipality can be directly liable for a constitutional violation when its policies, practices and customs were arbitrary and conscience shocking even though no individual officer's conduct rose to the level of a constitutional violation. *Trigalet*, 239 F.3d 1150 (10th Cir. 2001). As a municipality is a person capable of violating a citizen's constitutional rights, the answer is obviously, yes. Accordingly, the Tenth Circuit clearly erred in dismissing Petitioners' direct municipal liability claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed February 7, 2001]

No. 98-5261

JEAN F. TRIGALET; MYRA J. TRIGALET, Personal Representatives of the Estate of Constance Trigalet,
Plaintiffs-Appellees,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA. (D.C. No. 92-CV-368).
D.C. Judge Sven Erik Holmes.

Before EBEL, LUCERO, and MURPHY, Circuit Judges.

OPINION

EBEL, Circuit Judge.

This interlocutory appeal is before us on our grant of review under 28 U.S.C. § 1292(b).[1] Specifically, the following controlling question of law was certified to this court:

> whether, under the rationale of Williams v. City & County of Denver, 99 F.3d 1009 (10th Cir. 1996), [op. vacated, 140 F.3d 855 (10th Cir. 1997), and j. vacated & case remanded, 153 F.3d 730, 1998 WL 380518 (10th Cir. 1998)], a municipality can be held liable if the City's actions can be characterized as arbitrary, or conscience-shocking, in a constitutional sense, even if there are no unconstitutional acts by an individual officer.

We answer this question in the negative. For purposes of this appeal the facts are not in dispute and are taken from the district court's orders of August 27, 1997 (denying summary judgment for defendants) and August 17, 1998 (denying in part and granting in part defendants' renewed motion for summary judgment and directing preparation of

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[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

request for interlocutory appeal). These facts are summarized as follows.

In May of 1990, Constance Trigalet, Martha Annette Trigalet, and Steven Munson were killed when a GMC Safari Minivan struck their Ford Escort station wagon. The minivan had run a red light while being pursued by members of the Tulsa Police Department (hereinafter "TPD"). The sole reason for the police pursuit was for a stolen vehicle offense. There was no information that the suspects in the fleeing van had committed any violent felony or were known for violent behavior.

The minivan ran at least eight stop signs as one of the officers pursued it through residential areas of central Tulsa, passing a high school, a park and coming within blocks of the University of Tulsa. This portion of the pursuit involved speeds in excess of sixty to sixty-five miles per hour, with the fleeing van traveling through stop signs at major intersections at between forty and fifty miles per hour without slowing. The officers were aware of the likelihood of encountering traffic during the pursuit. No supervisor or watch commander was notified of the pursuit, nor was the pursuit supervised, although the TPD's written vehicle pursuit policy then in force required that all pursuits be supervised and directed officers to terminate such pursuits when the hazards outweigh the benefits.

The training director for the TPD at the time of the accident testified that officers received the following training on high-speed pursuits: (1) twenty-four hours of hands-on training regarding the mechanical operation of a vehicle; and (2) some additional amount of training on the philosophy of

pursuits, the specifics of which he did not recall. The manager of safety and equipment for the TPD at the time of the accident testified that it was appropriate to chase any traffic offender no matter what the offense. Officers are trained to use due caution and common sense in evaluating pursuits. Due to the discretionary nature of the pursuit policy, unless a supervisor discontinues a chase, the decision to terminate a chase is solely up to the officer. From 1985 through 1990, seven officers were disciplined for pursuit policy violations. All of the violations dealt with technical violations of the pursuit policy and not the decision to initiate, continue, or terminate a pursuit.

Plaintiffs brought this 42 U.S.C. § 1983 action against a number of defendants, including the City of Tulsa. Summary judgment for defendants was entered in March of 1993. Plaintiffs both appealed and filed a motion for reconsideration. This court dismissed the first appeal in August of 1993. The district court then granted the motion for reconsideration and vacated part of its earlier dismissal. Specifically, the district court reinstated the case against the three officers who had participated in the chase. The officers then appealed, claiming the district court erred in denying them qualified immunity. We determined that the officers were entitled to qualified immunity, holding that it was not clearly established in May of 1990 that a police officer could be liable under § 1983 for an injury caused by a third party. See *Trigalet v. Young,* 54 F.3d 645, 648 (10th Cir. 1995) (reversing judgment of district court denying defendant officers' motion for summary judgment).

Plaintiffs then moved to revise the court's order dismissing the City, which was granted, thereby reinstating

the action against the City. Tulsa then filed a motion for summary judgment, which was initially denied. However, all proceedings were stayed pending the Supreme Court's decision in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998).

Plaintiffs had alleged that five elements of the TPD's policies and practices violated the constitutional rights of the decedents:

1. TPD failed to maintain records regarding prior pursuits which illustrates its lack of concern for the potentially fatal results of these pursuits;

2. TPD failed to adopt a policy which places meaningful restraints on officers regarding the institution, continuation and termination of pursuits;

3. TPD failed to properly monitor and supervise pursuits, leaving all pursuit decisions to highly-emotional, adrenalin-charged officers instead of allowing objective supervisory officers to make decisions concerning high-speed pursuits;

4. TPD failed to adequately train its officers with respect to the philosophy of pursuits including the justification for initiating, continuing and terminating pursuits; and

5. TPD failed to hold officers accountable for improper decisions to initiate, continue and terminate a pursuit.

Following the Supreme Court's decision in Lewis, in its August 1998 order, the district court granted summary judgment to Tulsa on plaintiffs' indirect, or derivative, liability claim. The court denied Tulsa's motion for summary judgment as to plaintiffs' theory that Tulsa could be liable based on its own policies and practices, holding that under the original panel decision in Williams, the city might be directly liable if its actions could be characterized as arbitrary or conscience shocking. The court specifically concluded that even though this court had vacated the Williams opinion, "its distinction between direct and indirect municipal liability is still valid and persuasive," and that there existed disputed issues of fact regarding whether the policies and practices of the Tulsa Police Department, by themselves, had violated plaintiffs' rights. This appeal followed.

I.

Williams was also a high-speed police case, resulting in the death of an innocent motorist caused when the speeding officer, who was not in actual pursuit of a suspect but was responding to a request for backup from a fellow officer, ran a red light and crashed into Ms. Williams' son's car. She sued the officer and the city under 42 U.S.C. § 1983, claiming the defendants had violated her son's constitutional right to substantive due process. The claims against the city were based both on the city's alleged deliberate indifference to the need to institute training, supervision and discipline procedures with respect to emergency driving and on its own conduct in hiring and training the officer. *Williams*, 99 F.3d at 1013. The district court determined as a matter of law that the officer's conduct was not unconstitutional and that therefore the city's policies and procedures could not give rise

to municipal liability based on the officer's conduct. *Id.* The court also held that the city could not be held liable based on its own conduct absent a constitutional violation by the officer. *Id.* We reversed, holding that the evidence would support the conclusion that the officer's conduct was unconstitutional and that the city might be held liable for that conduct. *See id.* We further held in light of governing Supreme Court authority that "the City may be held liable for its own conduct even absent unconstitutional conduct by [the officer]." *Id.* We concluded, however, that the evidence was insufficient "to send the issue of the City's direct liability to the jury." *Id.*

On petitions for rehearing, we vacated the opinion in Williams and directed rehearing en banc to address the following questions:

> 1. What standard determines whether the conduct of the officer in this case violated the constitutional rights of the plaintiff's decedent?
>
> 2. Applying that standard, is the ultimate determination of whether the constitution was violated by the officer's conduct to be made by the court or by a jury?
>
> 3. May the municipality be found liable for violating the constitutional rights of the plaintiff's decedent by its own conduct or policies in hiring and/or failing to train Officer Farr, even if the officer's conduct did not violate the constitutional rights of decedent?

Williams v. City & County of Denver, 140 F.3d 855 (10th Cir. 1997).

We later abated the appeal pending a decision by the Supreme Court in a factually similar case. We then vacated the district court's judgment and remanded Williams to that court for further proceedings in light of Lewis and *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997). *See Williams v. City & County of Denver*, 1998 U.S. App. LEXIS 13719, No. 94-1190, 1998 WL 380518, at **1 (10th Cir. June 26, 1998).

Lewis involved a high-speed police pursuit in which the police officer chased a speeding motorcycle driver, resulting in the death of the motorcycle passenger when the bike tipped over and the officer struck and killed the passenger. The Supreme Court granted certiorari to consider "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender?" *Lewis*, 523 U.S. at 836. Although Lewis did not involve an issue of municipal liability, the Court did examine the standard for judging alleged executive abuse of power violating a substantive due process right, concluding it is that which shocks the conscience. *See id.* at 846-48 and n.8. ("Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious that it may fairly be said to shock the contemporary conscience.") The Court further likened the high-speed police chase situation to that of a prison riot, holding that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not

give rise to liability under the Fourteenth Amendment, redressible by an action under 42 U.S.C. § 1983." *Id.* at 854. Under this standard, the officer's actions did not shock the conscience. *See id.* at 855.

Brown involved an action by a plaintiff against a deputy sheriff who injured plaintiff when he used excessive force to remove her from the passenger side of a stopped vehicle. Plaintiff sued the county and the county sheriff, claiming liability based on the county sheriff's decision to hire the deputy. The claim against the sheriff was dismissed before trial, but the county stipulated that the sheriff was a policy maker regarding his department. *See Brown,* 520 U.S. at 401. The jury found the deputy liable for plaintiff's injuries based on his use of excessive force and the lack of probable cause to arrest her. *See id.* at 402. It also found the hiring and training policies of the county (as instituted by the sheriff as policy maker) so inadequate as to amount to deliberate indifference to plaintiff's constitutional needs. *See id.* The Supreme Court granted certiorari "to decide whether the county was properly held liable for [plaintiff's] injuries based on [the sheriff's] single decision to hire [the deputy]." *Id.*

The Court reiterated its requirement that a plaintiff seeking to impose § 1983 liability on a municipality must identify a policy or custom that caused plaintiff's injury. *See id.* at 403. It is not enough, however, that the plaintiff "identify conduct properly attributable to the municipality," *id.* at 404.

The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that

the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Id. (altered emphasis ours).

Key to the Court's discussion of the circumstances supporting municipal liability is that there be a violation of plaintiff's constitutional rights.

II.

It is against the background of these cases that we consider whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights. We conclude, based on Lewis and Brown, as well as decisions from this and other circuits, as discussed below, that a municipality cannot be held liable under these circumstances. *See also City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").

In *Webber v. Mefford,* 43 F.3d 1340 (10th Cir. 1994), we considered a § 1983 action against a police officer and the City of Sapula for injuries caused when a fleeing suspect, pursued by the officer, collided with plaintiffs, causing severe injuries. We held that a police officer violates a bystanders' substantive due process rights only when the officer displays reckless indifference to the risk created and directs his actions

toward the bystander.[2] We further held that "[a] claim of inadequate training, supervision, and [pursuit] policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised," *id.* at 1344-45.

We have recognized the need for a predicate constitutional violation in other contexts as well. In *Myers v. Oklahoma County Board of County Commissioners*, 151 F.3d 1313, 1316 (10th Cir. 1998), we acknowledged the well-established principle that a municipality cannot be liable under § 1983 for its employees' actions (here, excessive force) "if a jury finds that the municipal employee committed no constitutional violation."[3]

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[2]As previously explained, the reckless or deliberate indifference standard has since changed to conduct that shocks the conscience. *See Lewis*, 523 U.S. at 855; *Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10th Cir. 2000). We have also recognized that Lewis principles apply "whether the claimant is a police suspect or an innocent victim." *See Childress*, 210 F.3d at 1157-58; *Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998) (holding deputy not constitutionally liable for death of innocent bystander where deputy did not intend to harm victim).

[3]In Myers, we were further concerned with the exception to the requirement for individual officer liability under circumstances where the jury could have returned its verdict for the officers based on qualified immunity. Under that circumstance, because the county was not entitled to qualified immunity, the suit could proceed against the court. *Id.* at 1317-18.

Support for our position is found in the decisions of our sister circuits as well. *See, e.g., Evans v. Avery,* 100 F.2d 1033, 1039-40 (1st Cir. 1996) (following holding in Heller that absent constitutional violation by officer, city cannot be held liable); *S.P. v. City of Takoma Park, Md.,* 134 F.3d 260, 272 (4th Cir. 1998) (assuming training of officers was unconstitutional, city could not be held liable where no constitutional violation by officers had occurred); *Temkin v. Frederick County Comm'rs,* 945 F.2d 716, 724 (4th Cir. 1991) (claim that commissioners failed to adopt adequate policies governing training and supervision of officers' high-speed pursuits could not be made out absent constitutional violation by officers); *Scott v. Clay County, Tenn.,* 205 F.3d 867, 879 (6th Cir.), *cert. denied,* (2000) (holding that conclusion no officer-defendant deprived plaintiff of any constitutional right a fortiorari defeats claim against county); *Claybrook v. Birchwell,* 199 F.3d 350, 361 (6th Cir. 2000) (same); *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 596-97 (7th Cir. 1997) (determining that officers did not violate constitution in seizing plaintiff's decedent mandated conclusion that neither City nor police chief could be held liable); *Tesch v. County of Green Lake,* 157 F.3d 465, 477 (7th Cir. 1998) (where correctional officers at county jail did not violate constitution, county and county sheriff not liable); *Treece v. Hochstetler,* 213 F.3d 360, 364 (7th Cir. 2000) (municipality's liability for constitutional injury requires finding of individual officer liability on underlying claim); *Roach v. City of Fredericktown, Mo.,* 882 F.2d 294, 298 (8th Cir. 1989) (for municipal liability to attach, there must first be underlying violation of plaintiff's constitutional rights by municipal employee); *Kiser v. City of Huron,* 219 F.3d 814, 816 (8th Cir. 2000) (plaintiff must first establish that officers' actions are unlawful before municipality can be held liable);

Brodnicki v. City of Omaha, 75 F.3d 1261, 1266 (8th Cir. 1996) (since officers did not violate plaintiff's rights, it follows that claim against city under theory of inadequate custom or municipal custom lacks merit); *Quintanilla v. City of Downey,* 84 F.3d 353, 355 (9th Cir. 1996) (holding public entity not liable for § 1983 under policy "that can cause constitutional deprivations when the factfinder concludes that an individual officer, acting pursuant to the policy, inflicted no constitutional harm to the plaintiff,"); *Scott v. Henrich,* 39 F.3d 912, 916 (9th Cir. 1994) (holding that although liability of municipalities does not turn on liability of individual officers, "it is contingent on a violation of constitutional rights"; where no constitutional violation occurred, municipality could not be held liable); *Rooney v. Watson,* 101 F.3d 1378, 1381 (11th Cir. 1996) (concluding that where officer's conduct in striking plaintiffs' vehicle at high speed did not cause constitutional violation, court would not inquire into county's policy and custom regarding patrol vehicle operation and training). *But see Fagan v. City of Vineland,* 22 F.3d 1283, 1291-92 (3d Cir.) (holding that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the constitution"), on reh'g en banc, 22 F.3d 1296 (1994).[4]

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[4]Other courts have disagreed with the Fagan decision. *See Evans v. Avery,* 100 F.3d 1033, 1040; *Thompson v. Boggs,* 33 F.3d 847, 859 n.11 (7th Cir. 1994); *Neal v. St. Louis County,* 52 F. Supp. 2d 1090, 1096 (E.D. Mo. 1999), *aff'd,* 217 F.3d 955, 959 (8th Cir. 2000); *Hildebrandt v. City of Fairbanks,* 957 P.2d 974, 977-78 & n.7 (Alaska 1998). Further, it appears that a subsequent panel of the Third Circuit has questioned the Fagan panel's analysis. See *Mark v. Borough of Hatboro,* 51 F.3d 1137, 1153

Here, the threshold issue is whether the action causing the harm (police pursuit resulting in death of innocent bystander) states a constitutional violation at all. Because there was no evidence that the officer intended to harm the decedents, Lewis dictates that no constitutional harm has been committed. Therefore, plaintiffs cannot meet the first prong of the test set forth in *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992) ("proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.").

Thus, even if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation. *See S.P.*, 134 F.3d at 272 (citing *Brown*, 520 U.S. at 404, for requirement that plaintiff show direct causal link between municipal action and deprivation of federal rights in order to hold municipality liable under § 1983). *See also Heller*, 475 U.S. at 799 (holding that where plaintiff has not suffered constitutional injury at the hands of individual police officer, fact that departmental regulations might have *authorized* use of constitutionally excessive force is "quite beside the point") (emphasis in original); *Kiser*, 219 F.3d at 816 (holding "when a § 1983 plaintiff seeks to hold a municipality liable based on its alleged inadequate training and supervision of its police officers[,] . . . that plaintiff must first establish that the officers' actions were unlawful"); *Quintanilla*, 84 F.3d at 355

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n.13 (3d Cir. 1995).

(public entity not liable even if policy could potentially cause constitutional deprivations where factfinder concluded individual officer inflicted no constitutional harm in this instance).

In sum, we hold that absent a constitutional violation by the individual police officers whose conduct directly caused plaintiffs' injuries, there can be no municipal liability imposed on the City of Tulsa on account of its policies, customs, and/or supervision with regard to the individual defendants.

Accordingly, the district court's order denying the City of Tulsa's motion for summary judgment on plaintiff's claim of direct liability is REVERSED, and we REMAND with directions to the district court to enter summary judgment for the City of Tulsa as to that claim. We express no opinion as to the grant of summary judgment to the City of Tulsa on plaintiffs' claim of indirect liability based on the alleged unconstitutional actions of the police officers, as that determination is not part of this appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed October 27, 1998]

No. 92-C-368-H
(Consolidated)

JEAN F. TRIGALET; MYRA J. TRIGALET, Personal Representatives of the Estate of CONSTANCE TRIGALET,
Plaintiffs,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation,
Defendant.

ORDER

The Complaint in this case was filed on May 4, 1992. The Plaintiffs filed their First Amended Complaint on June 26, 1992. Subsequently, a Second Amended Complaint was filed on September 15, 1992. On September 17, 1992, the Defendants filed a motion to dismiss which the Court granted on March 30, 1993.

The Plaintiffs filed a motion to reconsider on April 21, 1993. On November 23, 1993, the Honorable Judge James O. Ellison granted the motion to reconsider in part. Judge Ellison allowed the lawsuit to proceed against the three officers actually involved in the pursuit, Stege, Warrick and Pierce. Judge Ellison left intact his dismissal of the lawsuit against the remainder of the individual defendants and the City of Tulsa.

On January 3, 1994, the three individuals remaining in the lawsuit filed an appeal based upon qualified immunity. On May 2, 1995, the Tenth Circuit issued its opinion in this cause. The Tenth Circuit held the three officers were entitled to qualified immunity.

The Plaintiffs subsequently filed a motion requesting that this Court revise its previous order dismissing the case against the City of Tulsa. On January 31, 1996, the Court granted the Plaintiffs' request and allowed the lawsuit to proceed against the City.

On February 2, 1997, the City of Tulsa filed a motion for summary judgment. On August 26, 1997, the Court denied the City's motion. However, the Court stayed further proceedings in the case pending the decision of the United States Supreme Court in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1997), cert. granted, 117 S.Ct. 2406 (U.S. June 2, 1997) (No. 96-1337). The Court also stated that after the decision in *Lewis*, additional dispositive motions could be filed. On May 26, 1998, the Supreme Court decided *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998).

On July 2, 1998, the City of Tulsa filed a motion for summary judgment. On August 18, 1998, this Court entered an order granting in part and denying in part the City's motion. Based upon the Supreme Court's ruling in *Lewis* and the subsequent decision of the Tenth Circuit in *Radecki*, 1998 WL 334490, this Court found that the individual officers did not violate the substantive due process rights of the Plaintiffs. The Court granted the City of Tulsa's motion for summary judgment on that basis.

Based upon the rationale of *Williams v. City and County of Denver*, 99 F. 3d 1009, (10th Cir. 1996), the Court found that the City of Tulsa could be liable "not derivatively on the basis of unconstitutional conduct by an individual officer, but directly on the basis of the unconstitutional nature of the City's policy itself. Although the Defendant correctly noted that the *Williams* opinion had been vacated by the en banc Tenth Circuit, this Court found the distinction between direct and indirect municipal liability was still valued and persuasive." *Williams v. City and County of Denver*, No. 94-1190, 1998 WL 380518 at *1 (dated June 26, 1998). On that basis the City of Tulsa's motion for summary judgment was denied.

On August 26, 1998, the City of Tulsa filed a motion for reconsideration based upon the Tenth Circuit's opinion in *Myers v. Oklahoma County Bd. of Commissioners*, No. 97-6003 (10th Cir. August 20, 1998). At a hearing on September 30, 1998, this Court denied the City's motion finding the rationale of *Williams* was still valid.

The Court specifically finds that (1) its Order of August 17, 1998, involves a controlling question of law (2) as

to which there is substantial difference of opinion, and (3) an immediate appeal will materially advance the ultimate termination of this litigation.

The Court is cognizant of the flexible approach to Section 1292(b). *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1263 (7th Cir. 1980); *Burckett v. Bardahl Oil Co.*, 470 F.2d 793, 796 (10th Cir. 1972).

Controlling Question of Law: A question which materially affects the outcome of litigation in this Court is a controlling question of law. *In re Cement Antitrust Litigation*, 673 F.3d 1020, 1027 (9th Cir. 1982), aff'd 459 U.S. 1190 (1983); *Katz v. Carte Blanche Corp.*, 496 F 2d 747, 755 (3rd Cir. 1974). In this case, the controlling question of law is as follows:

Whether a municipality may be held liable directly on the basis of the unconstitutional nature of the City's policy itself even if there are no unconstitutional acts by an individual officer. *Williams v. City and County of Denver*, 99 F.3d 1009, 1019-1020 (10th Cir. 1996).

The Court believes that the rationale of *Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir. 1996) distinguishing between direct and indirect liability of a municipality is still valid. However, the Court recognizes that the *Williams* opinion has been vacated. The Court finds that determination of the controlling question of law certified at the conclusion of this Order will have a substantial impact on this case. In addition, the Court believes that the continuing validity of the *Williams* rationale is sufficiently important to affect litigation involving police pursuits throughout the Tenth

Circuit, both for pending and future cases. ***Steinle v. Boeing Co.***, 785 F. Supp. 1434, 1444 (D. Kan. 1992), aff'd 24 F.3d 1259 (10th Cir. 1994). Resolution of the controlling issue of law by the Tenth Circuit will save time and expense for both the Court and the litigants. *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). Therefore the Court finds that a controlling question of law is present.

Substantial Grounds For Difference Of Opinion: The Court is aware that the opinion in *Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir. 1996) has been vacated. However, the Court notes that in vacating its opinion in *Williams*, the Tenth Circuit did not give any indication that the rationale of *Williams* was no longer valid. The Court believes it is bound by that rationale.

The Court finds there is a substantial ground for difference of opinion as to the application of *Williams*, warranting certification of permissive interlocutory appeal. The parties in the instant case do not contest the finding that there are substantial grounds for a difference of opinion.

Immediate Appeal Would Advance The Ultimate Termination Of The Litigation: The trial of this case would be lengthy and expensive. The issue of the City of Tulsa's liability has been the subject of several motions and hearings. As noted above the Court believes that under the *Williams* rationale, a municipality may be held liable if the City's actions "can be properly characterized as arbitrary, or conscience-shocking, in a constitutional sense" even though there are no unconstitutional acts by an individual officer. *Williams*, 99 F.3d at 1019. If the *Williams* rationale is not valid the City of Tulsa will be entitled to judgment. Judgment

for the City would negate the necessity of a lengthy and expensive trial. For these reasons, the Court concludes that an immediate appeal would materially advance the ultimate termination of this litigation.

Based on the above, the Court hereby grants the joint application of the parties for §1292(b) certification The [sic] Court's Order of August 17, 1998, is hereby amended to provide as follows:

> This Order (1) involves a controlling question of law, (2) as to which there is a substantial ground for difference of opinion, and (3) an immediate appeal will materially advance the ultimate termination of this litigation. This Order is therefore certified for permissive interlocutory appeal under 28 U.S.C. §1292 (b) to resolve the following question: Whether, under the *Williams* rationale, a municipality can be held liable if the City's actions can be characterized as arbitrary, or conscience-shocking in a constitutional sense even if there are no unconstitutional acts by an individual officer? All matters in this litigation are stayed pending final resolution of the issues presented by this Order in the United States Court of Appeals for the Tenth Circuit.

It Is So Ordered.

This 24th day of October, 1998.

/s/_____
Sven Erik Holmes
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed August 17, 1998]

No. 92-C368-H

JEAN F. TRIGALET; MYRA J. TRIGALET, Personal Representatives of the Estate of CONSTANCE TRIGALET,
Plaintiffs,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation,
Defendant.

ORDER

This matter comes before the Court on a renewed motion for summary judgment by Defendant City of Tulsa (Docket # 122). In an order dated August 26, 1997, the Court denied Defendant's motion for summary judgment, but stayed the matter pending a decision by the United States Supreme Court in Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1997); cert. granted, 117 S.Ct. 2406 (U.S. June 2, 1997) (No. 96-1337). The Court also stated that after a

decision in Lewis, additional dispositive motions could be filed. The Supreme Court decided County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998), on May 26, 1998. Defendant now renews its motion for summary judgment on Plaintiffs' claims arising under 42 U.S.C. § 1983.

I

As in the previous motion for summary judgment, for the purposes of this motion, the Court accepts as true the following material facts alleged by Plaintiffs:

1. On Saturday, May 6, 1990, at approximately 12:09 a.m., Constance Trigalet, Martha Annette Trigalet, and Steven Munson were lawfully traveling southbound on Peoria Avenue in Tulsa when a GMC Safari Minivan struck their Ford Escort station wagon. The minivan, which ran a red light while traveling west on 3rd Street, and was being pursued by members of the Tulsa Police Department (hereinafter "TPD"). The Trigalets and Munson died as a result of injuries sustained in the collision.

2. The police pursuit began near midnight on May 6. Officers Warrick and Ashby (known to the TPD as David 382 and David 101, respectively), observed two vans stopped on westbound 13th Street. The drivers of the vans were not violating any traffic laws when the officers observed them.

3. After observing the vans on 13th Street, Officers Warrick and Ashby decided to investigate the vans because they thought the drivers of the vehicles were acting suspicious, and thus that the vehicles might be stolen.

4. The exact time at which the officers first observed the two vans is unknown. The first radio transmission in reference to these vans occurred at 12:04:59, May 6, 1990, when Officer Warrick said "81 to 01, They're still west on 13th". The first radio transmission was recorded when both officers got into their cars and Officer Warrick pulled behind the vans on 13th Street.

5. Officers Ashby and Warrick followed the vans from Winston and 13th Street, until Officer Greg Smith (known to the TPD as David 384) confirmed that the GMC minivan was stolen. The officers then activated their emergency lights, and Officer Ashby pulled one of the vans over. The GMC minivan driver increased his speed, and Officer Warrick began a high-speed pursuit of the van.

6. The sole reason for the pursuit was for a stolen vehicle offense. There was no information that the suspects in the fleeing van had committed any violent felony or were known for violent behavior. Most stolen vehicles are recovered without the necessity of a pursuit.

7. The passengers in the van pulled over by Officer Ashby were juveniles who were associated with or related to the driver of the van that fled. Officer Ashby questioned the occupants of the stopped van concerning the identity of the people in the fleeing van. The occupants of the stopped van answered questions regarding the identity of the driver of the fleeing van.

8. Officer Warrick pursued the GMC minivan on the following path: west on 13th Street to Louisville, then north on Louisville to 5th Place, then west on 5th Place to

Jamestown, then north on Jamestown to 3rd Street, then west on 3rd Street to Indianapolis, then north on Indianapolis to 2nd Street, then west on 2nd Street to approximately 2nd and Gary, where Officer Warrick lost sign [sic] of the minivan. Officer Warrick never terminated his pursuit, but continued the pursuit even down 3rd Street when officers were involved in the pursuit.

9. The minivan ran at least eight stop signs as Officer Warrick pursued it through residential areas of central Tulsa. During the pursuit the minivan passed a high school and a park, and came within blocks of the University of Tulsa. This portion of the pursuit involved speeds in excess of 60-65 mph, with the fleeing van traveling through stop signs at major intersections between forty and fifty mile [sic] per hour without slowing. During Officer Warrick's pursuit of the vehicle, he broadcast information concerning the pursuit continuously, including the fact that the suspect was "busting" through major intersections.

10. Officer Warrick lost sight of the van in the vicinity of 2nd Street and Gary. Officer Harry Stege renewed the pursuit shortly thereafter when he observed the minivan driving through the intersection of 2nd Street and Delaware.

11. Officer Stege knew of the pursuit because an eastside division officer announced on his radio subfleet that eastside division had been in pursuit of a blue van for several minutes. Using the information he received from the radio transmission, Officer Stege was able to close in on the van. Officer Stege saw the van turn south on Delaware from 2nd Street and pursued it from there.

12. The minivan then turned west on 3rd Street, never decreasing speed for the turn, and accelerated from there. The 3rd Street portion of the pursuit reached speeds up to 80 mph. Officer Stege pursued the minivan west on 3rd Street through Lewis Avenue, a main north-south thoroughfare in Tulsa, at a speed in excess of 70 mph. Officer Stege continued the pursuit through Utica Avenue, another main north-south thoroughfare, at a speed approaching 80 mph.

13. During Stege's pursuit of the fleeing suspect, he noted that the driver of the vehicle was operating the minivan "without any regard to the safety of life or property." Despite this fact, Officer Stege never considered discontinuing the pursuit.

14. When Officer Don Pierce heard on his police radio that the pursuit was approaching his location, he activated his emergency lights and set up at 3rd and Utica to join in hen [sic] pursuit. He then joined the pursuit at 3rd Street and Utica Avenue.

15. The pursuit ended at 3rd Street and Peoria Avenue at 12:09:37 a.m., when the minivan collided with the Plaintiffs' decedent's vehicle.

16. Prior to the pursuit, a helicopter was en route to the pursuit scene. Mr. Clifford Magee saw the suspect vehicle pass by his home without its lights on with a police vehicle a few car lengths behind it. Within a couple of seconds of the suspect and police vehicle passing his home, Mr. Magee observed another TPD vehicle pass his home at a high rate of speed. In addition, immediately after the pursuit,

Mr. Magee observed a helicopter passing his home near where the pursuit ended.

17. In addition to numerous through streets, the pursuit crossed five main thoroughfares at high speeds - 11th Street on Louisville, Harvard on 2nd Street, Delaware on 3rd Street, Lewis on 3rd Street, Utica on 3rd Street, and finally Peoria on 3rd Street.

18. Officer Warrick knew that traffic could be expected on the pursuit route at any time, and he knew that there was the possibility of severe injury or death to a motorist that might be traveling along a street during this pursuit. Officer Warrick knew that the suspect was driving without due regard for life as he drove through each stop sign. However, at each stop sign, Officer Warrick made the conscious decision to continue the pursuit.

19. Officer Stege knew that traffic could be expected on Lewis, Utica and Peoria Avenues at anytime, and he knew that a collision at this pursuit's speed could cause severe injury or death. Officer Stege described the minivan as being driven "without any regard for the safety of life or property." As Officer Stege approached 3rd Street and Peoria, he knew that the minivan would hit anyone traveling north or south on Peoria because it could not make the green light. However, Officer Stege did not consider abandoning the pursuit. At his deposition Officer Stege stated that "[i]nterrupting the pursuit didn't enter [his] mind."

20. Officer Pierce knew that people are likely to be traveling on Tulsa streets going to and from recreation and entertainment on a Saturday night at midnight. Officer Pierce

also knew that Utica and Peoria are arterial north-south streets in Tulsa, and that traffic could be expected along those streets at any time of the day or night.

[No Paragraph 21 in original].

22. Moments before the collision and before Officer Pierce had joined in the pursuit, two police vehicles were observed pursuing the minivan down 3rd Street across Wheeling Avenue. The first police vehicle was one or two car lengths behind the minivan and the other police vehicle, which Plaintiffs contend was Officer Warrick, who had rejoined pursuit on 3rd Street, was seconds behind the first police vehicle.

23. No supervisor or watch commander was notified of this pursuit, nor did any supervisor or watch commander supervise this pursuit.

24. The posted speed limit for east 3rd Street between Delaware and Peoria Avenues was on May 6, 1990, and still is, 30 mph. The speed limit was unposted on all other portions of the pursuit path taken May 6, 1990. The unposted residential Tulsa speed limit is 25 mph.

[No Paragraph 25 in original].

26. The TPD's written vehicle pursuit policy in force May 6, 1990, required that all pursuits be supervised, and directed officers to terminate such pursuits when the hazards outweigh the benefits.

[No Paragraph 27 in original].

[No Paragraph 28 in original].

29. David Been, who was the training director for the TPD at the time of the accident, testified that prior to May 6, 1990, officers received the following training on high-speed pursuits: (1) 24 hours of hands-on training regarding the mechanical operation of a vehicle; and (2) some additional amount of training on the philosophy of pursuits, the specifics of which he did not recall.

30. O.L. Harris, who was safety and equipment manger for the TPD at the time of the accident, testified that it was appropriate to chase any traffic offender no matter what the offense. Officers are trained to use due caution and common sense in evaluating pursuits. Due to the discretionary nature of the pursuit policy, unless a supervisor discontinues a chase, the decision to terminate a chase is solely up to the officer.

31. From 1985 through 1990, seven officers were disciplined for pursuit policy violations. All of the violations dealt with technical violations of the pursuit policy and not the decision to initiate, continue, or terminate a pursuit.

II

Summary judgment is appropriate when "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of

law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

Plaintiffs assert that the Defendant violated their constitutional rights to substantive due process under the Fourteenth Amendment, and therefore their claims are cognizable under § 1983. Specifically, Plaintiffs assert that (1) the actions of the police officers in this case violated Plaintiffs' constitutional rights and that Defendant is legally responsible for such violations, and (2) the policies and practices of Defendant violated the Plaintiffs' constitutional rights.

A

In Lewis, the Supreme Court addressed the standard for a substantive due process violation as a result of a high-speed chase. The Supreme Court held that in such a case "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." Id. at 1711-12. Since Lewis, the Tenth Circuit also has addressed liability for a due process violation based upon police conduct and explored the reasoning behind the Lewis opinion. Radecki v. Barela, No. 96-2297, 1998 WL 334490 (10th Cir. June 24, 1998).

In Radecki, the Tenth Circuit noted that the Lewis standard built upon the principles previously articulated in Tenth Circuit opinions. These principles include the need for restraining the scope of substantive due process claims, the policy that § 1983 actions should not displace state tort law, and the necessity for deference to local bodies in public safety decisions. Radecki, 1998 WL 334490, at * 3, * 5. These principles, the Supreme Court stated, support the conclusion that substantive due process can only be violated when governmental conduct "shocks the conscience." Lewis, 118 S.Ct. at 1717.

Lewis also recognized that there exists a spectrum of governmental conduct upon which a due process violation could occur. The Supreme Court reiterated that, at one end of the spectrum, liability for negligent acts of state officials does not sustain a due process violation. Id. at 1718. At the "other end of the culpability spectrum" is "conduct intended to injure in some way unjustifiable by any governmental

interest." Id. This type of conduct, the Supreme Court observed, is most likely to shock the conscience and result in a due process violation. In the middle range of culpability is conduct that is more than negligent but less than intentional conduct. Id. "Within this middle range, Lewis directs us to analyze the level of culpability by examining the circumstances that surround the conduct at issue and the governmental interest at stake." Radecki, 1998 WL 334490, at * 5.

In this middle range of conduct, the Supreme Court focused on the government official's opportunity for deliberation. For example, in a custodial prison situation, officials can and are required to attend to the needs of an inmate. In this sense, actual deliberation by officials is practical and is in fact employed. Thus, "deliberate indifference" in the prison custodial context may well rise to a constitutionally shocking level. Lewis, 118 S.Ct. at 1719. The Court contrasted the custodial situation, however, with an official response to a prison riot or other violent disturbance. In this situation, "a much higher standard of fault than deliberate indifference" must be shown to sustain liability. Id. at 1720.

Lewis specifically compared the level of culpability required for officials in a prison riot to the level of culpability needed in a high-speed police chase. In both the prison riot and police chase situations, officials must "act decisively" and "show restraint" at the same time, id., while acting "'in haste, under pressure, and frequently without the luxury of a second chance.'" Id. (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). As the Tenth Circuit has stated, "[b]oth situations require the officer's instant judgment, and

accordingly, no substantive due process claim can lie unless the defendant official's conduct was unjustified by any government interest and was 'tainted by an improper or malicious motive.'" Radecki, 1998 WL 334490, at *6 (quoting Lewis, 118 S.Ct. at 1721). Thus, the legal standard applicable in this case can be summarized as follows:

> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

Radecki, 1998 WL 334490, at * 6.

Plaintiffs first argue that the holding of Lewis is inapplicable to the instant case since Plaintiffs were innocent bystanders who were injured. Plaintiffs contend that Lewis applies only when the person injured is a suspect fleeing from police. In Lewis, Brian Willard, who was driving the motorcycle, fled after being approached by police. Lewis, 118 S.Ct. at 1712. Willard's passenger on the motorcycle was Phillip Lewis, who was killed in the high-speed chase that ensued. Id.

The Court rejects Plaintiffs' argument that Lewis is limited to situations when individuals fleeing from police are injured. Nothing in the language of the opinion supports such a limitation and the Court's discussion clearly does not draw that distinction. See id. at 1720 n.13 (citing an instance in which a citizen suffered injury from police action). Moreover, in Radecki, the individual injured was a citizen who assisted a police officer after hearing screams. Radecki, 1998 WL 334490, at * 1. Accordingly, the Court finds that the standard enunciated in Lewis controls the current situation.

In the instant case, as in Lewis and Radecki, the officers wee acting in an emergency situation without the opportunity for deliberation or considered thought. At the hearing, counsel for Plaintiffs conceded that the officers did not have an intention to injure Plaintiffs and that the record is devoid of any such intentional conduct. There is also no indication that the officers' actions were not justified by an improper government interest. Thus, considering the emergency nature of the situation, the lack of intent to harm on part of the officers, and the great deference given to law enforcement in these situations, the Court finds that the officers did not violate the substantive due process rights of the Plaintiffs. Accordingly, Defendant's motion for summary judgment on this basis is hereby granted.

B

Plaintiffs next claim that even if the individual officers did not violate the Plaintiffs' substantive due process rights, the City of Tulsa is liable for the Plaintiffs' injuries as a result of its own policies and practices. Plaintiffs cite Williams v.

City and County of Denver, 99 F.3d 1009 (10th Cir. 1996) for this proposition. Specifically, Plaintiffs allege that the Tulsa Police Department violated their constitutional rights in five areas: (1) failure to maintain adequate records of pursuits; (2) failure to adopt a pursuit policy with clear guidelines; (3) failure to properly train officers regarding pursuits; (4) failure to properly supervise and monitor officers regarding pursuits; and (5) failure to properly discipline officers regarding pursuits. In contrast, Defendant argues that a municipality may not be held liable if there is no underlying constitutional violation by its employees.

In Williams, the Tenth Circuit noted that there are two categories of cases in which a municipality may be liable under § 1983. First, a municipality may be liable for "failing to train an employee who as a result acts unconstitutionally." Id. at 1019. In this category, the unconstitutional acts are committed by the individual officers. The municipal policy, although it may be constitutional, must be the "moving force" behind the employee's unconstitutional conduct, id., and must demonstrate deliberate indifference to the rights of the public. Id. at 1020. In this category, the city "may not be held liable where there was no underlying constitutional violation by any of its officers." Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993) (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam)).

Second a municipality may be liable "not derivatively on the basis of unconstitutional conduct by an individual officer, but directly on the basis of the unconstitutional nature of the city's policy itself." Williams, 99 F.3d at 1019. If the city's action "can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense," id. at 1020

(citing Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)) then a city may be liable even if there are no unconstitutional acts by an individual officer. Id.

As noted above, since the Court finds that there has been no underlying constitutional violation by the officers in the instant case, there can be no municipal liability under the first category of indirect liability. See Hinton, 997 F.2d at 782; Heller, 475 U.S. at 799. Accordingly, Defendant's motion for summary judgment on this basis was granted.

As to the second category of municipal liability, Defendant correctly notes that the Williams opinion has be vacated by the en banc Tenth Circuit and remanded to the district court in light of the Supreme Court opinions in Lewis and Board of County Comm'rs v. Brown, 117 S.Ct. 1382 (1997). See Williams v. City and County of Denver, No. 94-1190, 1998 WL 380518, at * 1 (10th Cir. June 26, 1998) (unpublished). Since Williams, however, the Supreme Court has made a distinction between a situation in which a municipal policy that itself is unconstitutional and a situation in which a municipality has not inflicted injury directly through its own actions. Brown, 117 S.Ct. at 1388-89. In the first situation, "when an official municipal policy itself violates federal law, issues of culpability and causation are straightforward; simply proving the existence of the unlawful policy puts an end to the question." Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing Brown, 117 S.Ct. at 1388-89). However, when a city's policy is lawful on its face "and the municipality therefore has not directly inflicted the injury through its own actions," culpability and causation are more difficult in terms of proof. Id.

Thus, even though the opinion in Williams has been vacated, its distinction between direct and indirect municipal liability is still valid and persuasive. The Court previously ruled that there were disputed issues of fact as to whether the policies and practices of the TPD, by themselves, violated Plaintiffs' constitutional rights. The Court finds nothing in Lewis or in the vacating of the Williams opinion that alters the analysis or conclusion in that ruling. Accordingly, Defendant's renewed motion for summary judgment on this basis is hereby denied.

IV

For the reasons set forth above, Defendant's motion for summary judgment (Docket # 122) is hereby granted in part and denied in part. The scheduling order in this case is also hereby stricken.

As directed at the hearing, within one month from the file date of this order, the parties are to prepare a request for interlocutory appeal. The request for interlocutory appeal should address the Court's second conclusion in this order denying summary judgment on the basis of unconstitutional policies by Defendant, relying upon the Tenth Circuit's analysis in Williams. The request for interlocutory appeal will be granted if, and only if, Defendant places on file in this case a statement from the Magistrate Judge Joyner indicated that Defendant is satisfactorily complying with his discovery order, dated May 8, 1997.

IT IS SO ORDERED.

This 14th day of August, 1998.

/s/_____
Sven Erik Holmes
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed August 27, 1997]

No. 92-C-368-H

JEAN F. TRIGALET; MYRA J. TRIGALET, Personal Representatives of the Estate of CONSTANCE TRIGALET, *Plaintiffs*,	)
v.	)
CITY OF TULSA, OKLAHOMA, a municipal corporation, *Defendant*.	)

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant City of Tulsa (Docket # 102). Defendant seeks summary judgment on Plaintiffs' claims arising under 42 U.S.C. § 1983.

I

For the purposes of this motion, the Court accepts as true the following material facts alleged by Plaintiffs:

1. On Saturday, May 6, 1990, at approximately 12:09 a.m., Constance Trigalet, Martha Annette Trigalet, and Steven Munson were lawfully traveling southbound on Peoria Avenue in Tulsa when a GMC Safari Minivan struck their Ford Escort station wagon. The minivan, which ran a red light while traveling west on 3rd Street, and was being pursued by members of the Tulsa Police Department (hereinafter "TPD"). The Trigalets and Munson died as a result of injuries sustained in the collision.

2. The police pursuit began near midnight on May 6. Officers Warrick and Ashby (known to the TPD as David 382 and David 101, respectively), observed two vans stopped on westbound 13th Street. The drivers of the vans were not violating any traffic laws when the officers observed them.

3. After observing the vans on 13th Street, Officers Warrick and Ashby decided to investigate the vans because they thought the drivers of the vehicles were acting suspicious, and thus that the vehicles might be stolen.

4. The exact time at which the officers first observed the two vans is unknown. The first radio transmission in reference to these vans occurred at 12:04:59, May 6, 1990, when Officer Warrick said "81 to 01, They're still west on 13th". The first radio transmission was recorded when both officers got into their cars and Officer Warrick pulled behind the vans on 13th Street.

5. Officers Ashby and Warrick followed the vans from Winston and 13th Street, until Officer Greg Smith (known to the TPD as David 384) confirmed that the GMC minivan was stolen. The officers then activated their emergency lights, and Officer Ashby pulled one of the vans over. The GMC minivan driver increased his speed, and Officer Warrick began a high-speed pursuit of the van.

6. The sole reason for the pursuit was for a stolen vehicle offense. There was no information that the suspects in the fleeing van had committed any violent felony or were known for violent behavior. Most stolen vehicles are recovered without the necessity of a pursuit.

7. The passengers in the van pulled over by Officer Ashby were juveniles who were associated with or related to the driver of the van that fled. Officer Ashby questioned the occupants of the stopped van concerning the identity of the people in the fleeing van. The occupants of the stopped van answered questions regarding the identity of the driver of the fleeing van.

8. Officer Warrick pursued the GMC minivan on the following path: west on 13th Street to Louisville, then north on Louisville to 5th Place, then west on 5th Place to Jamestown, then north on Jamestown to 3rd Street, then west on 3rd Street to Indianapolis, then north on Indianapolis to 2nd Street, then west on 2nd Street to approximately 2nd and Gary, where Officer Warrick lost sign [sic] of the minivan. Officer Warrick never terminated his pursuit, but continued the pursuit even down 3rd Street when officers were involved in the pursuit.

9. The minivan ran at least eight stop signs as Officer Warrick pursued it through residential areas of central Tulsa. During the pursuit the minivan passed a high school and a park, and came within blocks of the University of Tulsa. This portion of the pursuit involved speeds in excess of 60-65 mph, with the fleeing van traveling through stop signs at major intersections between forty and fifty mile [sic] per hour without slowing. During Officer Warrick's pursuit of the vehicle, he broadcast information concerning the pursuit continuously, including the fact that the suspect was "busting" through major intersections.

10. Officer Warrick lost sight of the van in the vicinity of 2nd Street and Gary. Officer Harry Stege renewed the pursuit shortly thereafter when he observed the minivan driving through the intersection of 2nd Street and Delaware.

11. Officer Stege knew of the pursuit because an eastside division officer announced on his radio subfleet that eastside division had been in pursuit of a blue van for several minutes. Using the information he received from the radio transmission, Officer Stege was able to close in on the van. Officer Stege saw the van turn south on Delaware from 2nd Street and pursued it from there.

12. The minivan then turned west on 3rd Street, never decreasing speed for the turn, and accelerated from there. The 3rd Street portion of the pursuit reached speeds up to 80 mph. Officer Stege pursued the minivan west on 3rd Street through Lewis Avenue, a main north-south thoroughfare in Tulsa, at a speed in excess of 70 mph. Officer Stege continued the pursuit through Utica Avenue, another

main north-south thoroughfare, at a speed approaching 80 mph.

13. During Stege's pursuit of the fleeing suspect, he noted that the driver of the vehicle was operating the minivan "without any regard to the safety of life or property." Despite this fact, Officer Stege never considered discontinuing the pursuit.

14. When Officer Don Pierce heard on his police radio that the pursuit was approaching his location, he activated his emergency lights and set up at 3rd and Utica to join in hen [sic] pursuit. He then joined the pursuit at 3rd Street and Utica Avenue.

15. The pursuit ended at 3rd Street and Peoria Avenue at 12:09:37 a.m., when the minivan collided with the Plaintiffs' decedent's vehicle.

16. Prior to the pursuit, a helicopter was en route to the pursuit scene. Mr. Clifford Magee saw the suspect vehicle pass by his home without its lights on with a police vehicle a few car lengths behind it. Within a couple of seconds of the suspect and police vehicle passing his home, Mr. Magee observed another TPD vehicle pass his home at a high rate of speed. In addition, immediately after the pursuit, Mr. Magee observed a helicopter passing his home near where the pursuit ended.

17. In addition to numerous through streets, the pursuit crossed five main thoroughfares at high speeds - 11th Street on Louisville, Harvard on 2nd Street, Delaware on 3rd

Street, Lewis on 3rd Street, Utica on 3rd Street, and finally Peoria on 3rd Street.

18. Officer Warrick knew that traffic could be expected on the pursuit route at any time, and he knew that there was the possibility of severe injury or death to a motorist that might be traveling along a street during this pursuit. Officer Warrick knew that the suspect was driving without due regard for life as he drove through each stop sign. However, at each stop sign, Officer Warrick made the conscious decision to continue the pursuit.

19. Officer Stege knew that traffic could be expected on Lewis, Utica and Peoria Avenues at anytime, and he knew that a collision at this pursuit's speed could cause severe injury or death. Officer Stege described the minivan as being driven "without any regard for the safety of life or property." As Officer Stege approached 3rd Street and Peoria, he knew that the minivan would hit anyone traveling north or south on Peoria because it could not make the green light. However, Officer Stege did not consider abandoning the pursuit. At his deposition Officer Stege stated that "[i]nterrupting the pursuit didn't enter [his] mind."

20. Officer Pierce knew that people are likely to be traveling on Tulsa streets going to and from recreation and entertainment on a Saturday night at midnight. Officer Pierce also knew that Utica and Peoria are arterial north-south streets in Tulsa, and that traffic could be expected along those streets at any time of the day or night.

[No Paragraph 21 in original].

22. Moments before the collision and before Officer Pierce had joined in the pursuit, two police vehicles were observed pursuing the minivan down 3rd Street across Wheeling Avenue. The first police vehicle was one or two car lengths behind the minivan and the other police vehicle, which Plaintiffs contend was Officer Warrick, who had rejoined pursuit on 3rd Street, was seconds behind the first police vehicle.

23. No supervisor or watch commander was notified of this pursuit, nor did any supervisor or watch commander supervise this pursuit.

24. The posted speed limit for east 3rd Street between Delaware and Peoria Avenues was on May 6, 1990, and still is, 30 mph. The speed limit was unposted on all other portions of the pursuit path taken May 6, 1990. The unposted residential Tulsa speed limit is 25 mph.

[No Paragraph 25 in original].

26. The TPD's written vehicle pursuit policy in force May 6, 1990, required that all pursuits be supervised, and directed officers to terminate such pursuits when the hazards outweigh the benefits.

[No Paragraph 27 in original].

[No Paragraph 28 in original].

29. David Been, who was training director for the TPD at the time of the accident, testified that prior to May 6, 1990, officers received the following training on high-speed

pursuits: 1) 24 hours of hands-on training regarding the mechanical operation of a vehicle; and 2) some additional amount of training on the philosophy of pursuits, the specifics of which he did not recall.

30. O.L. Harris, who was safety and equipment manger for the TPD at the time of the accident, testified that it was appropriate to chase any traffic offender no matter what the offense. Officers are trained to use due caution and common sense in evaluating pursuits. Due to the discretionary nature of the pursuit policy, unless a supervisor discontinues a chase, the decision to terminate a chase is solely up to the officer.

31. From 1985 through 1990, seven officers were disciplined for pursuit policy violations. All of the violations dealt with technical violations of the pursuit policy and not the decision to initiate, continue, or terminate a pursuit.

II

Summary judgment is appropriate when "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails

> to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

Plaintiffs assert that the Defendant violated their constitutional rights to due process under the Fourteenth Amendment, and therefore their claims are cognizable under Section 1983. Specifically, Plaintiffs assert that (1) the actions of the police officers in this case violated Plaintiffs' constitutional rights and that Defendant is legally responsible for such violations, and (2) the policies and practices of Defendant violated the Plaintiffs' constitutional rights.

This motion is controlled by Williams v. Denver City and County, et al., 99 F.3d 1009 (10th Cir. 1996). In Williams, a police officer responded to a call for backup by activating his lights, but not his siren, and accelerating his speed to approximately 60 m.p.h. in a 35 m.p.h. zone. Without slowing down, the officer ran a red light and broadsided another vehicle. The driver of the other vehicle died from the injuries sustained in the accident.

The Tenth Circuit denied summary judgment to both the individual police officer and the city on the claims arising out of the conduct of the individual police officer, and granted summary judgment to the city on the claims arising out of its own policies and practices. In so doing, the Tenth Circuit distinguished between the analysis applicable to the conduct of individual officers for which a municipality is alleged to be legally responsible, and the analysis applicable to the policies and practices of a municipality for which such municipality is alleged to be directly responsible. Id. at 1014. Such distinct analyses apply in this case.

A

To determine whether a municipality is liable for the conduct of an individual police officer, the court must decide (1) whether such conduct caused a constitutional violation, and (2) if so, whether the municipality was responsible for that violation. Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992). A constitutional violation requires that (1) the defendant act with reckless intent,[1] and (2) the defendant's conduct shocked the conscience. Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) cert. denied, 116 S.Ct. 924. A

---

[1]In Uhlrig the Tenth Circuit stated that "recklessness" satisfies the scienter requirement of Section 1983:

> [I]n reckless conduct, the defendant recognized the unreasonable risk and actually intends to expose the plaintiff to such risk without regard to the consequences to the plaintiff.

64 F.3d at 573 n. 8.

municipality is liable for such constitutional violations when "the need for more or different training is so obvious in the violation of constitutional rights that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." City of Canton, 489 U.S. at 390.

Applying both Williams and the legal standards set forth above, the Court concludes that an issue of material fact exists in this case both as to whether the conduct of the police officers constituted a violation of the Plaintiffs' constitutional rights, and as to whether the City is responsible for such alleged violation. Accordingly, Defendant's motion for summary judgment on the claims arising out of the officers' actions is denied.

B

Defendant further moves for summary judgment on Plaintiffs' claims of direct liability arising our of the City's allegedly unconstitutional policies and practices. See Collins, 503 U.S. at 120. As the Tenth Circuit stated in Williams, "[i]n a Collins case . . . the inquiry is whether the policy or custom itself is unconstitutional so as to impose liability on the city for its own unconstitutional conduct in implementing an unconstitutional policy." In Williams, the Tenth Circuit found, inter alia, the following facts concerning the officer involved in the case, Officer Farr:

> At the time Officer Farr applied for a position with the Denver Police Department, he had a very poor driving record. His license had been revoked three times, and he had been convicted of numerous traffic violations, including four convictions for speeding. Other law

enforcement agencies had previously denied him employment at least four times. The executive director of the Denver Civil Service Commission strongly recommended that Officer Farr not be hired because of his driving record and felt that "he was an accident waiting to happen." The director attached a handwritten note to Officer Farr's file which stated: "Do not waste time on this one. Three suspensions. Flunks because of driving record." The psychological report requested by the City with respect to Officer Farr's application stated that he "may show a serious behavioral or emotional adjustment disorder" and "strongly recommended that follow-up testing and interviewing be conducted in order to determine the significance and range of these difficulties." The report noted that Officer Farr showed "a significant history and/or pattern of motor vehicle infractions and driving difficulties. These are likely to include moving violations, automobile accidents, and, in some cases, driving while under the influence of drugs or alcohol." Despite this report and another psychologist's recommendation that the City investigate Officer Farr further, it did not conduct additional testing or inquiry before hiring him.

The City did not give Officer Farr any special or remedial driving training after hiring him, and he had nine incidents of unacceptable driving during the training he did receive. Prior to the collision at issue here, Officer Farr was involved in another accident in which he hit a car while making a U-turn into oncoming traffic without using his emergency lights or siren. Officer Farr was found at fault and received a

> written reprimand. Although he was ordered to attend remedial driving training, he did not do so.

Based on these facts, the court analyzed the claim for direct municipal liability as follows:

> Ms. Williams offered evidence that the City hired Officer Farr despite his poor driving record, against the recommendation of the executive director of the civil service commission, and despite reports by two psychologists recommending he not be hired without further testing. The City did not conduct that testing, nor did it require Officer Farr to take remedial training notwithstanding nine incidents of unacceptable driving and a prior accident in which Officer Farr was at fault for hitting another car under analogous circumstances. The record also contains evidence that the City generally did not require its police officers to comply with the applicable safety provisions.
>
> While this conduct by the City should not be condoned, "[t]he Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.'" Collins, 503 U.S. at 129 (citation omitted). We cannot say that the conduct here "was so egregious, outrageous and fraught with unreasonable risk as to shock the conscience." Uhlrig, 64 F.3d at 576. Accordingly, we affirm summary judgment for the City on this claim.

In the instant case, Plaintiffs allege that five (5) elements of the policies and practices of the TPD violate the Plaintiffs' constitutional rights:

1. TPD failed to maintain records regarding prior pursuits which illustrates its lack of concern for the potentially fatal results of these pursuits;

2. TPD failed to adopt a policy which places meaningful restraints on officers regarding the institution, continuation and termination of pursuits;

3. TPD failed to properly monitor and supervise pursuits, leaving all pursuit decisions to highly-emotional, adrenalin charged officers instead of allowing objective supervisory officials to make decisions concerning high-speed pursuits;

4. TPD failed to adequately train its officers with respect to the philosophy of pursuits including the justification for initiating, continuing and terminating pursuits: and

5. TPD failed to hold officers accountable for improper decisions to initiate, continue and terminate a pursuit.

The Court is not persuaded that any of these elements standing alone meets the two requirements for a constitutional violation articulated in Uhlrig. The Court concludes, however, that there is an issue of material fact as to whether the five elements taken together meet the legal standard presently applicable to this case. Accordingly, Defendant's

motion for summary judgment on the claims arising from the TPD's policies and practices is denied.

IV

For the reasons set forth above, the Court holds that there are issues of material fact with respect to the claims of both indirect and direct liability. Therefore, Defendant's motion to summary judgment is denied at this time.

Moreover, the United States Supreme Court recently granted certiorari in Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1997) cert. granted, 117 S.Ct. 2406 (U.S. June 2, 1997) (No. 96-1337), on the question of what standard should be used in analyzing cases involving high speed police chases. The parties have filed a joint motion to stay this case pending the Supreme Court's decision in Lewis. The Court agrees that this case should be stayed, and thus the parties' joint motion is granted. A new scheduling order shall be entered in this case after the Supreme Court has ruled on the Lewis case, which new scheduling order will provide an opportunity for dispositive motions, if appropriate, under the legal standard articulated by the Supreme Court in Lewis.

IT IS SO ORDERED.

This 26th day of August, 1997.

/s/_____
Sven Erik Holmes
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1682

IN THE

Supreme Court of the United States

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Petitioners,

v.

CITY OF TULSA, OKLAHOMA, A MUNICIPAL CORPORATION,
Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals For The Tenth Circuit

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from the parties granting consent to the filing of this brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel

ATLA is a voluntary national bar association with more than 60,000 trial lawyer members who primarily represent individual plaintiffs in civil actions, including actions seeking vindication of constitutional and civil rights protected under federal and state statutes, as well as damages actions for wrongful death and personal injury. ATLA's mission includes preserving and advancing constitutional rights and civil rights guaranteed by federal and state statutes.

Petitioner in this case asks the Court to resolve a conflict among various Circuit Courts of Appeal regarding the question of whether a municipality, through implementation of its unconstitutional policies, can be found to have violated the substantive due process rights of a person injured or killed as a result of the policies' implementation, absent a finding of the requisite "purpose to harm" on the part of the non-policymaking employee who engaged in the conduct which inflicted the injuries or, as in this case, resulted in deaths. Because the opinion below did not impose liability upon a City whose unconstitutional policies caused deaths, and constitutes an unwarranted departure from this Court's precedents, ATLA respectfully submits this brief as amicus curiae in support of the Petition for Certiorari.

SUMMARY OF ARGUMENT

If unconstitutional municipal policies proximately and indisputably cause death, the municipality should not be immune from liability, irrespective of whether the officers implementing the policy acted with subjective intent to injure or violate rights. Disregarding this Court's prior decisions, the Court below ruled otherwise. Petitioner now asks this Court: Where a municipality, through deliberate conduct of its policymakers, has adopted or approved of policies that are

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make a monetary contribution to the preparation or submission of this brief.

arbitrary and conscience-shocking, and such policies are the proximate cause of a person's injuries or death, should the municipality be able to escape liability under Section 1983 because its employees were not aware of, did not anticipate and did not intend the likely results of the implementation of such policies? The answer to this question must be an unqualified "no" if the principle of local governmental liability established by *Monell v. Department of Social Services,* 436 U.S. 658 (1978), is to remain viable.

If unconstitutional municipal policies that cause death are placed beyond the reach of civil rights claimants by the ignorance or "good faith" of employees effectuating those policies, such a court-made rule would create a direct incentive for local governments to employ shoddy training and wrap their agents in a cloak of ignorance – shielding municipalities from liability in contexts where they are most blameworthy. The "ignorance" immunity afforded municipalities under such a scheme would expand proportionately with the cities' failure to train and inform. Ultimately, this immunity would operate to bar relief for even the most egregious and unconscionable constitutional violations by local government, effectively placing these constitutional wrongs beyond the reach of federal law.

While the implications of such a ruling are disturbing as a general matter, they are particularly frightening in the context of police pursuit cases, which often result in unintended injuries and deaths. If the Tenth Circuit's ruling is not reviewed by this Court, those persons injured and the families of those killed in police chases that occur as a result of arbitrary and conscience-shocking policies, will be barred from a remedy under § 1983, directly contrary to the law established by this Court in *Monell.*

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS DIRECTLY CONTRARY TO PRECEDENT ESTABLISHED BY THIS COURT AND CREATES NEW IMMUNITY

For decades, the law of local governmental liability under 42 U.S.C. § 1983 has been settled. This Court established that local government entities are "persons" and, as such, they will be liable for injuries caused by policies that violate constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). More than twenty years ago, in *Owen v. City of Independence*, 445 U.S. 622, 650, (1980), this Court rejected a claim that municipalities should be afforded qualified immunity, and made it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983. Thus, local government bodies may be sued directly under § 1983 where an unconstitutional official policy causes injury. *Monell,* 436 U.S. at 694. Yet, the Court below has directly undermined *Monell* jurisprudence, imposing a barrier to municipal liability that will be insurmountable as a practical matter.

Disturbing settled precedent, the Tenth Circuit also has adopted a new rule of imputed immunity. The new rule permits local governments to implement arbitrary and conscience-shocking policies that cause death with impunity, so long as those carrying out the policy act without subjective intent to injure. Such a holding disturbs the long-settled rule that liability under § 1983 is determined according to the actor's own conduct and state of mind. *Oklahoma City v. Tuttle,* 471 U.S. 808, 817-18, *reh'g denied,* 473 U.S. 925 (1985) (reiterating *Monell's* prohibition against *respondeat superior* liability).

Applying the Tenth Circuit's rationale, proof that a municipal custom or policy was the "moving force" behind a constitutional violation no longer will result in municipal

liability. *Cf., City of Canton v. Harris,* 489 U.S. 378, 385-91 (1989) (municipal liability arises under § 1983 where official custom or policy is the "moving force" resulting in constitutional violation). Even if the policy is arbitrary and conscience-shocking, in a constitutional sense, the local entity is relieved of liability if the physical conduct that implements the policy is undertaken by employees who have no intent to harm suspects physically or to worsen their legal plight. *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1155 (10th Cir. 2001). That the policy proximately and undisputedly caused the harm is of no consequence.

> [E]ven if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation.

Id.

The Tenth Circuit's statement and rationale directly contradict *Monell* and *City of Canton*, under which liability properly is based on the violation of a constitutional right coupled with municipal responsibility for the constitutional violation. Both the constitutional violation and the responsibility for it occur at the policymaking level in this case. The act of the non-policymaking officer in engaging in the high speed pursuit is all the predicate conduct that is required. The fact that the low-level officer has committed no "predicate constitutional violation," *Trigalet,* 239 F.3d at 1154, because he lacked the requisite state of mind, does not affect the liability of the City for the constitutional harm caused by the implementation of its conscience-shocking policy.

The effect of the appellate court's ruling will be imputed immunity at the policymaking level for substantive due process violations where lower-level employees serve as both conduits for action and buffers to liability. Local governments will be immune from suit unless the victim of

the unconstitutional policy can show that the government employee possessed the requisite level of mental culpability. As in the present case, families of people who are killed as a direct and proximate result of unconstitutional policies will have no remedy under § 1983 against the government whose policies caused the deaths.

If *City of Canton*'s statement of the predicates for municipal liability is law, and if *Monell*'s prohibition against imputed conduct and state of mind under § 1983 is law, the Tenth Circuit's absolution of Tulsa for the deaths cause by its unconstitutional policies must be wrong. A municipal policy that causes deaths is itself a violation of plaintiff's constitutional rights.

II. MUNICIPALITIES ARE ACCOUNTABLE UNDER SECTION 1983 FOR THEIR OWN VIOLATIONS OF CONSTITUTIONAL RIGHTS

The Tenth Circuit relied on *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), concluding that Substantive Due Process actions require proof that the employee whose actions cause harm possessed intent to injure. *Heller*, however, is irrelevant and was cast far beyond its proper locus by the appellate court.

The Ninth Circuit recognized in *Heller* that there is no Fourth Amendment injury unless an officer acts in an objectively unreasonable manner. Thus, the court upheld a jury verdict in favor of the officer based on an instruction and finding of objective reasonableness supporting qualified immunity. *Heller v. Bushey*, 739 F.2d 1371, 1374 (9th Cir. 1985), *rev'd sub nom., City of Los Angeles v. Heller*, 475 U.S. 796 (1986). The jury instructions were clear on this point and the jury clearly adjudicated "reasonableness."

Assessing whether the *Monell* claim survived the general jury verdict, however, the court engaged in obvious speculation. Assuming that the jury's ruling on individual

liability *could* have been based either on a finding that the city's "escalation of force" policy was reasonable and the officer was following the policy, or that the officer's actions were reasonable irrespective of the policy, the court assumed the latter might be true. *Id.* at 1375. However, no instruction had been given on this question. Thus, the proper ruling would have been that the *Monell* claim was waived by failure to offer the instruction or object to its omission. Rule 51, Fed. R. Civ. Pro. The Ninth Circuit's unnecessary speculation concerning the jury's mental processes forced this Court to take corrective action and, in doing so, to state:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 799.

Heller holds only that, where a jury finds for an officer after proper instructions on the Fourth Amendment standard of objective reasonableness, the text of official policy governing arrests is irrelevant: the force incident to the arrest was lawful and there is no injury upon which a claim may be based. In the present case, however, there is no dispute that the officer was implementing a municipal policy that is arbitrary, conscience-shocking and unconstitutional and that the implementation of that policy resulted in the deaths of three innocent persons. *Heller*'s reasoning is not applicable.

As this Court noted, in analyzing municipal policy claims, two separate issues must be addressed: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city [was] responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). *Collins* reaffirms *Monell*, ruling that the municipality may be held liable under § 1983 when the "execution of the government's policy or custom . . . inflicts

the injury." *Id.* at 123. When an official municipal policy itself violates federal standards, issues of culpability and causation are straightforward; simply proving the implementation of the unlawful policy puts an end to the question. If official policy is unconstitutional, and is the moving force causing injury, liability will be imposed. *Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 404-05 (1997).

Heller did not overrule *City of Canton*, nor did it limit this obvious principle explained in *Brown*. *Heller* merely requires proof of constitutional injury resulting from an unlawful governmental policy. Such proof was completely lacking in *Heller*. It is not lacking in the present action.

The Tenth Circuit extended *Heller* far beyond its actual boundaries. This Court should correct that error and prevent the erosion of *Monell* liability that results from the appellate court's legal error and disregard for this Court's post-*Heller* precedents, which reaffirm that municipal liability is predicated on unlawful municipal policies, not the reasonableness of the actors who carry them into effect. *E.g., Collins*, 503 U.S. at 120.

The court below also disregarded this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* resolved the standard applicable to determine personal liability for officers engaged in high-speed chases. *Lewis* instructs that police officers involved in high-speed chases "with no intent to harm suspects physically or to worsen their legal plight" are not liable for violations of the Fourteenth Amendment's Substantive Due Process protections.

In the Tenth Circuit's view expressed in the present case, an officer's lack of intent automatically insulates the municipality from liability, as well as the individual officer. The lower court's reliance on *Lewis* for this conclusion is misplaced, however, and is directly contradicted by the rationale set forth in Justice Souter's opinion.

This Court set a high threshold for officer liability based on a recognition that "unforeseen circumstances demand an officer's instant judgment" without the luxury of time for reflection when pursuing a suspect. 523 U.S at 853. Municipal authorities are responsible for: (1) enacting policies that determine when such pursuits are appropriate; and (2) training officers to effectuate those policies when conducting pursuits in the field. Municipal policy-making and training are not conducted under such exigent circumstances.

Tacitly acknowledging the legal distinction between individual liability based on snap field decisions, and detached policy-making and training by local government, this Court specifically stated that liability of the County of Sacramento was not before the Court because there was "no genuine factual dispute as to whether the county adequately trains its officers in the conduct of vehicular pursuits or whether the pursuit policy of the Sheriff's Department evinces deliberate indifference to the constitutional rights of the public." 523 U.S. at 838 n.2. Clearly this Court did not take the view espoused by the Tenth Circuit, that the officer's lack of ill intent and concurrent immunity could be imputed to the County, precluding the County's liability as a matter of law. Consistent with *Monell* and *Canton*, this Court acknowledged that liability of the governmental unit remained a separate issue of fact, irrespective of the officer's liability or immunity. *Id.* The Tenth Circuit's ruling contravenes this Court's analysis and ruling in *Lewis*, and this Court should grant the review requested to correct the lower court's misapplication of *Lewis* to the present case.

III. THE TENTH CIRCUIT HAS DRAMATICALLY CURTAILED CIVIL RIGHTS PROTECTION.

When considering the Petition, ATLA urges the Court to consider the practical impact of the ruling below. If the Tenth Circuit's analysis is permitted legal effect, local governments

will enjoy blanket immunity for the most offensive and facially unconstitutional measures. It should be emphasized that this is not a case where a *suspect* has been injured after a chase and claims the force used to apprehend or subdue was unreasonable. In the present case, three bystanders were killed as a result of a policy that permitted high speed chases in residential areas to apprehend suspects of property crime. Three people died, and their families were deprived of their companionship and support, because the City of Tulsa had adopted shocking and arbitrary policies that led to their deaths.

ATLA does not urge this Court to entertain *ad hoc*, result-driven disposition. On the contrary, ATLA urges this Court to consider the profound policy implications wrought by the decision below and related precedent. Section 1983 is intended to secure enormously important public benefits -- constitutional conduct by those who act under color of state law -- through the vehicle of federal civil remedies for constitutional violations. Certainly, there remains a strong federal interest in enforcing federal rights. Equally certain, 42 U.S.C. § 1983 continues to be a valuable tool to encourage adherence to federal law and protect these federal rights. As this Court stated in *Monell*, to accomplish these federal purposes, the statute should be construed "to give a broad remedy for violations of federally protected civil rights." 436 U.S. at 685.

For vehicle pursuit cases, the Tenth Circuit's rationale will limit, severely, enforcement of federal Substantive Due Process against municipalities that adopt unconstitutional pursuit policies. Bystanders injured because of facially unconstitutional policies will only be allowed to bring a federal civil rights action against local governments responsible for those policies where an officer acts with subjective purpose to harm and with no legitimate law enforcement objective. Even if killed or horribly injured, these individuals will have no right of enforcement although the policy clearly caused the harm.

Carrying the example of the present case to its logical end: What if the policy had permitted not only pursuit, but use of deadly force to apprehend car thieves, without regard to other circumstances? Instead of being killed by the collision, the bystanders were shot dead by stray bullets from guns fired by the pursuing officers. Under current law, absent a purpose to harm the bystanders, the officers may not be held liable for violating the bystanders' substantive due process rights. Pursuant to the Tenth Circuit's decision, the City would also be immune from liability for the enforcement of its unconstitutional policy. Local government policies that are facially unconstitutional are not subject to federal enforcement power, if the acting officer did not intend harm that is caused by their implementation, no matter how deliberately indifferent local government policymakers may have been to the obvious consequences of the policy.

Police pursuit cases undeniably require application of constitutional protections within difficult and emergent circumstances. While there is some justification for setting a high threshold of culpability for plaintiffs to meet before recovery is allowed against individual officers engaged in rapidly-developing, emergency-type situations, there is no legitimate reason to afford such protection or deference to the conduct of policymakers who intentionally and knowingly adopt a course of action that is deliberately indifferent to the safety and welfare of citizens.

Unless the Court is prepared to abandon important and well-established constitutional principles limiting municipal authority, it should grant the Petition and reconsider the flawed analysis of the appellate court. A facially unconstitutional policy that is the moving force causing death or injury must yield to federal civil rights and their enforcement. The Petitioner presents this Court with an opportunity to exercise its preeminent role in defining the appropriate limits of local authority and to correct an obvious error in logic and law that has serious implications, not only for civil rights, but for public safety as well.

The Tenth Circuit's opinion, if permitted to go unreviewed, will foster deliberate indifference to individual rights and invite local government to ignore constitutional limits on municipal authority. The potential for harm is obvious, as are the implications for curbing municipal disregard for constitutional protection, if the Court does not grant the Petition.

CONCLUSION

For the forgoing reasons, Amicus urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

JEAN TRIGALET and MYRA TRIGALET,
As personal representatives of the estates of CONSTANCE TRIGALET and MARTHA ANNETTE TRIGALET, and LEONARD MUNSON, as personal representative of the estate of STEVEN LEWIS MUNSON
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipality can be directly liable for violating a citizen's substantive due process rights when the individual officer's conduct did not rise to the level of a substantive due process violation.

II. Whether a municipality may be directly liable for violating a citizen's constitutional rights when the policies, practices, and customs of the municipality were arbitrary, conscience shocking and a proximate cause of the deaths of the petitioner's decedents.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests this Honorable Court deny the writ for certiorari, sought by the Petitioners, seeking review of the decision of the Tenth Circuit Court of Appeals granting judgment to the City of Tulsa.

OPINIONS BELOW

The opinions and orders previously entered in this action are appropriately set out in the Appendix to the Petitioners' petition.

THE PETITION FOR WRIT SHOULD BE DENIED

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause that has been decided by the highest court of last resort before presentation to this Court. Certiorari should only be granted when the case clearly presents a situation indicative of unfair justice and that redress cannot be obtained through ordinary proceedings.

This Court has recognized the limited jurisdiction available by way of certiorari. Only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion of authority between the circuit courts of appeal.

Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, (1923).

The rules of this Court also define the narrow limits of such review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. These rules set forth the circumstances that must exist for a writ of certiorari to be granted.

In the present case, review is sought on the ground that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue." Supreme Court Rule 10 (a). While Petitioners suggest that the case merits review to resolve a conflict among the court of appeals, the conflict identified by the Petitioners is illusory. However, a review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other circuit court of appeals.

I

A MUNICIPALITY CANNOT BE HELD LIABLE FOR VIOLATING A PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN THE OFFICERS WHOSE CONDUCT DIRECTLY CAUSED THE PERSON'S INJURIES DID NOT VIOLATE THE PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS.

Petitioners assert there is a difference between this Court's holding in *City of Canton v. Harris*, 489 U.S. 378 (1989) and *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) regarding whether a municipality can be held liable when an officer whose conduct caused a person's injuries is

found not to have violated the person's constitutional rights. Extant jurisprudence does not support this position.

In *Heller*, issues pertaining to an individual police officer's individual civil rights misconduct were bifurcated for purposes of trial from a concurrent claim that the City of Los Angeles was responsible for the officer's misconduct as a result of its police regulations. A jury was impaneled to determine the officer's liability. The jury determined that the officer had not violated the plaintiff's constitutional rights. Upon that finding, the trial court dismissed the concurrent claim against the City of Los Angeles, concluding that there could be no basis for the City's liability if the individual officer had not violated the plaintiff's constitutional rights. Reversal of this judgment by the Ninth Circuit in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985) prompted a fairly blunt reinstatement of the trial court's decision by this Court:

> [T]his was an action for damages, and neither *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), nor any other of our cases authorize the award of damages against a municipal corporation based upon the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point. *Heller*, 475 U.S. at 499.

In *Canton*, the Court recognized that inadequate training, in and of itself, is not sufficient to impose municipal liability. The Court did embrace the notion that if a concededly valid policy is unconstitutionally applied by a municipal employee, the City is liable if the employee has not been adequately trained and the constitutional wrong has

been caused by that failure to train. Applying this principle, the Court stated at page 391:

> [F]or liability to attach in this circumstance the individual deficiency in a city's training must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.

In *Collins v. City of Harker Heights*, 503 U.S. 115, (1992) the Court reiterated that an underlying constitutional violation must exist to impose liability on a municipality. Therein, the Court's stated, at page 124,

> "We concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violations."

The Court went on to distinguish its use of the term "deliberate indifference" in Eighth Amendment cases. The Court continued, "that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents."

The cases are consistent in holding a municipality cannot be held liable when the officers whose conduct directly caused a person's injury did not violate the person's substantive due process rights.

II

THE CIRCUIT COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *HELLER* DOCTRINE THAT MUNICIPAL LIABILITY ONLY EXISTS WHEN THERE HAS BEEN AN UNDERLYING CONSTITUTIONAL VIOLATION.

Petitioners assert there is a wide ranging conflict between the circuits regarding the direct liability of a municipality when a third party is injured but does not suffer a constitutional deprivation. Case law does not support this position.

Every court of appeals decision except *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994) (panel opinion) is in accord with *Heller*. See: *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998); *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Leatherman v. Tarrant County*, 28 F.3d 1388 (5th Cir. 1994); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998); *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Myers v. Oklahoma County Bd. Of Com'rs*, 151 F.3d 1313 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

Petitioners claim "many courts have determined that *Heller* does not preclude consideration of municipal liability even when the individual officers have been exonerated." (Petitioners Brief at page 10). However, none of the cases cited by the Petitioners support this statement. Of seven cases, Petitioners cited only one case, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), that was decided

after this Court's decision in *Heller*. However, the Tenth Circuit addressed neither *Heller* nor the individual liability issue in *Berry*.

Petitioners contend the Tenth Circuit's reliance on *Heller* was incorrect. The Petitioners reason that *Heller* was a Fourth Amendment case while the present case is brought pursuant to the Fourteenth Amendment. They distinguish the present case because the Tenth Circuit applied the "shocks the conscience" standard to determine the individual officers had not violated petitioners' constitutional rights. Such a differentiation misses the point of *Heller* that whenever an injury is solely attributable to the actions of an officer, a municipality cannot be held liable if it is determined the officer did not commit a constitutional violation.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) this Court distinguished the custodial situation of a prison from that of a police pursuit. In a custodial situation the government deprives an individual of his liberty. In doing so, the government also deprives that person of his ability to care for himself. In those situations, it is possible that the harm that would befall an inmate was not the result of the actions of individual officers. Rather, the harm could result from the decisionmaker's choice. That choice could include lack of sufficient staff to protect the inmates or to have insufficient medical personnel on duty. In those cases it is the conscious choice of the decisionmaker, not the actions of individual officers that caused the harm. Thus, *Heller* would not be applicable.

In a pursuit situation, as in this case, the alleged injury arises from the decision made by individual officer to pursue a particular suspect. Since the injuries would be attributable solely to the decision of the individual officer to pursue, *Heller* would apply. *Barrett v. Orange County Human*

Rights Commission, 194 F.3d 341 (2nd Cir. 1999) is illustrative of this point.

In *Barrett*, the Second Circuit found that liability of the Commission was not inconsistent with a finding the individuals had committed no wrong. The Court noted the Commission was a multi-member board that makes its decisions as a group. The act of termination was an action of the group, not the named individuals. Thus, it was the Commission as a group that terminated Barrett, not the individual members of the Commission. Since the decision to terminate Barrett was not attributable solely to the individuals, *Heller* was not applicable to the situation.

Petitioners place great weight upon *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994). The *Fagan* panel, in a two to one decision, departed from established precedent. That panel stated:

> We decline to follow four other courts of appeals, which have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1499-500 (10th Cir. 1992) (city can be liable if pursuing officers violate Constitution but escape liability because of qualified immunity); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993) (same), cert. denied, --- U.S. ----, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994).

The *Fagan* opinion has been widely criticized and rejected by other circuits.

In *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the Court held that to prevail on a *Monell* claim, the plaintiff had to establish an underlying constitutional violation. The Court acknowledged the *Fagan* decision stating:

> *Fagan* attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of respondeat superior. That cannot be the case since *Monell* expressly holds that there is no cause of action for respondeat superior liability against a municipal corporation under 42 U.S.C. Sec. 1983. *Monell*, 436 U.S. at 694-95, 98 S.Ct. at 2037-38. Thus we choose to follow the clear holding of Heller that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. *Thompson*, 33 F.3d at 860, n. 11.

In *Evans v. Avery*, 100 F.3d 1033, (1st Cir. 1996) the Court stated at page 1039-1040:

> In *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the

> Constitution." *Id.* at 1292. The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policy makers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* *Evan* invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . .
>
> The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. (citations omitted) Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *Evans,* 100 F.3d at 1039-1040.

Another Third Circuit opinion has also criticized the rationale of the *Fagan* opinion. In *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) the appeals court said:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policy makers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong--establishing an underlying constitutional violation. *Mark*, 51 F. 3d at 1153, n. 13.

Petitioners set forth several cases they claim reach the same result as *Fagan*. However, those cases are distinguishable on their facts or have been misinterpreted by the Plaintiffs.

For instance, Plaintiffs rely heavily upon the case of *Chew v. Gates*, 27 F.3rd 1432 (9th Cir. 1994). In *Chew*, the individual officers caused a constitutional violation. In the present case it has been determined that the individual officers did not violate the constitutional rights of the Petitioners.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the plaintiff cited *Chew* for the proposition that a municipality could be held liable under §1983 notwithstanding a finding the individual defendants were found not to have committed a constitutional violation. The Ninth Circuit rejected such an interpretation of those decisions. The *Quintanilla* Court found *Heller* dispositive and plaintiff had to show the individual officers violated his constitutional rights before the municipality could be held liable.

Plaintiffs also cite *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). Citing *Heller*, the *Parrish* Court reiterated that municipal liability could not be imposed upon a finding that plaintiff's constitutional rights were not violated. *Parrish*, 963 F.2d at 207. The jury was required to answer special interrogatories. It made a finding the individual officer had violated the plaintiff's constitutional rights. In light of the jury's finding, the Court held municipal liability was not inconsistent. *Parrish*, 963 F.2d at 207.

The Eighth Circuit later examined *Parrish* in *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Finding the individual officers had not caused a constitutional violation, the *Robinson* Court found the municipality could not be held liable under §1983. The Court went on to say that, "Our recent decision in *Parrish v. Luckie* (citation omitted) is distinguishable because there the jury found that an officer had deprived plaintiff of her constitutional rights." *Robinson*, 972 F.2d at 977, n 3.

In support of their position, Petitioners claim the Eighth Circuit upheld a "verdict exonerating individual defendants but finding municipality liable" in *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) (Pet. Br. at 17). The Court in *Praprotnik*, at page 1173, footnote 3, actually stated:

> *Heller* is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* **Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.** The failure of the jury to

> find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. *Praprotnik*, 798 F.2d 1773, n. 3 (emphasis added).

The Petitioners next cite *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Gibson*, the appeals court reversed and remanded a decision in favor of the City because the plaintiffs did not have an opportunity to conduct discovery. The decision was based on the standards of Rule 12(b)(6). Later, in *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997), the same court, citing *Gibson*, held that finding the individuals had not violated the plaintiff's constitutional rights precluded a finding of liability on the part of the government. The appeals court stated:

> A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim. *Tesch*, 157 F.3d at 477 (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990).

The only other case cited by Petitioners that addresses the same issue is *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986). The Petitioners quoted from page 1233 of *Hewitt*, "The City could . . . be liable under *Monell*. . . even if [the individual officer] was exonerated, as long as [the officer] had in fact acted pursuant to municipal policy or regulation." In so holding, the Ninth Circuit relied upon its decision in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985). The viability of the *Bushey* opinion is doubtful in light of the fact the Supreme Court granted certiorari and vacated that

judgment in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

Petitioner has relied heavily on Eighth Amendment cases in their argument. In such cases the Constitution guarantees certain minimal custodial standards for persons who the government has deprived of their liberty. Such cases are distinguishable from the present case. The courts have been consistent in their application of *Heller* to cases involving allegations of injury directly attributable to the actions of individual officers.

III.

PETITIONERS' ARGUMENT THAT THE CITY IS DIRECTLY LIABLE PURSUANT TO *COLLINS* FOR INDEPENDENTLY VIOLATING THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PETITIONERS' DECEDENTS IGNORES THE FIRST PRONG OF THE COLLINS TEST.

Petitioners rely upon *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992) in support of their second question. The Petitioners state, "if the city's conduct could have been characterized as arbitrary in a constitutional sense or conscience shocking, the plaintiff would have stated a claim of direct municipal liability." (Petitioners' Brief at page 26). This argument is similar to the oft-criticized analysis of *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994). This analysis ignores the first prong of the *Collins* test – establishing an underlying constitutional violation. *Mark v. Borough of Hatboro*, 51 F.3d at 1153, n. 13.

Petitioners' argument ignores the Court's discussion of *Canton*. *Collins*, 503 U.S. at 123-124. There the Court stated that in *Canton*, "we concluded that if a city employee violates another's constitutional rights, the city may be liable

if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation." Petitioners' argument thus ignores the first prong of the *Collins* test- that the injury be caused by a constitutional violation. See *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996).

Lastly, despite Petitioners' statements to the contrary at page 27 of their petition, at no time has there been a finding that "the policies, practices and customs of Tulsa were arbitrary, conscience shocking and a proximate cause of the deaths of the Petitioners' decedents." In fact, the District Court noted there were disputed issues of fact as to the issue. See Petitioner For Writ of Certiorari, App. C at 38a-39a.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 5, 2001.

Respectfully submitted,

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